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## **DOUBLE AND NOTHING OPEN GOVERNMENT IN MONTANA UNDER ARTICLE II, SECTION 9 AND SECTION 10**

**Peter Michael Meloy\***

Anyone who has served on a policy-making body knows it is much easier making decisions in private because the discussion is more robust and the participants feel freer to ask questions and make comments that might be embarrassing if made in public. Custodians of government documents also maintain a proprietary interest in those documents and have a general reluctance to share them with every soul who comes by to examine them. These natural proclivities had some support in the law before 1972.

The delegates to the 1972 Constitutional Convention changed all that. The collective sense of the Convention was that while governing in private might be more efficient, it seriously affected the people's trust in their government. Accordingly, the delegates proposed and adopted Article II, Section 9, requiring governments to hold open meetings and make documents accessible to guarantee a person's fundamental right to know, thereby authorizing the judiciary to ensure that such guarantees were not subverted.<sup>1</sup> In promulgating the provision, Montana became one of a very few states in the Union with a specific constitutional guarantee of access to government meetings and documents. This article reviews the legislative and judicial treatment of Article II, Section 9, since the 1972 Constitution was ratified.

During most of this period, the courts have been generally supportive of transparency in government. Recently, however, there has been a disturbing trend in the decisions of the Supreme Court to return to the old tradition of what Justice Nelson called "translucency." In his dissent from the Court's adoption of the Rules for Lawyer Disciplinary Enforcement, he expressed his disappointment with the Court's decision to retain the private

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\* Peter Michael Meloy has been a member of the Montana Bar since 1971. He has been in private practice since 1974 with a focus on public access to government meetings and documents. He has been involved in a number of the cases discussed in this article on behalf of citizens and newspapers seeking access to meetings and records. As Director of Legal Services for the Montana Legislative Council in 1972 he worked with Constitutional Convention Delegates on legal issues during the Convention. He served in the Montana Legislature as Majority Whip (1975) and Majority Leader (1977) and sponsored several bills related to open meetings and documents. He thanks his former partner and good friend the Hon. Terry N. Trieweller and the Hon. James Nelson for reading this article and providing insightful comments. The author is enormously grateful to the editorial staff of the Montana Law Review, led by Emily Gutierrez Caton, for its invaluable commentary and tireless effort in assuring his characterization of the source material was reasonably accurate. And, he gives a special thanks to his daughter Maile Meloy whose well-honed editing skills made this piece readable.

1. MONT. CONST. art. II, § 9.

discipline provisions of the old rule. He believed that the process must be transparent if the public is going to have trust in the Court's disposition of complaints against attorneys.<sup>2</sup> Private discipline made the process "translucent," like a bathroom window: light comes in, but nothing can be seen.

In 1978, the Montana Law Review published a series of comments on the 1972 Montana Constitution.<sup>3</sup> The focus of the compilation was on rights guaranteed in the new Constitution that had no counterparts in the U.S. Constitution and how judicial consideration of these new rights might play out. David Gorman's comment on the right to know (Article II, Section 9) and the right of privacy (Article II, Section 10) discusses the potential "collision" of these concepts as they developed in future jurisprudence.<sup>4</sup> Noting that the courts had yet to address these two rights, he advocated a method of "reconciling" the rights.<sup>5</sup> He contended the courts should follow existing Fourth Amendment jurisprudence developed in the federal context to determine whether a valid privacy right exists, and then "the court would determine whether the public's right to know constitutes a compelling state interest within the context of the case."<sup>6</sup> The court would only proceed to the balancing test of Article II, Section 9, if it found the litigant's right to know constituted a compelling state interest.<sup>7</sup> In sum, he would have the courts "double up" on the right to know by reading the compelling interest threshold into the right-to-know guarantee.<sup>8</sup> This "doubling up" creates a significant obstacle for citizens who seek access to government documents and meetings. Not only would a petitioner need to establish that the demands of individual privacy did not clearly exceed the merits of public disclosure, but he or she would also bear the nearly impossible burden of showing there was a compelling interest in disclosure. Gorman urged this analysis to assure that upholding the right to know did not "avoid, and thus denigrate, the scope and weight to be accorded the right of privacy."<sup>9</sup>

This article will present the author's view that it is unnecessary to reconcile Sections 9 and 10 of Article II because the Convention delegates harmonized the two opposing rights within the text of Section 9: "No person shall be deprived of the right to examine documents or to observe the actions and deliberations of all public officials or agencies of state govern-

2. See *In re: Revising the Rules for Lawyer Disciplinary Enforcement*, Admin. Or. No. 06-0628 (Mont. Nov. 9, 2010).

3. Daniel Kemmis, *Environmental Rights*, 39 MONT. L. REV. 224 (1978); Jeanne M. Koester, *Equal Rights*, 39 MONT. L. REV. 238 (1978); David Gorman, *Rights in Collision: The Individual Right of Privacy and the Public Right to Know*, 39 MONT. L. REV. 249 (1978).

4. Gorman, *supra* note 3, at 249.

5. *Id.* at 266.

6. *Id.*

7. *Id.*

8. *Id.* at 266-67.

9. *Id.* at 267.

ment and its subdivisions, *except in cases in which the demand of individual privacy exceeds the merits of public disclosure.*”<sup>10</sup> While the Montana Supreme Court has developed its jurisprudence governing open meetings and records by construing Section 9 as a stand-alone right, it has also included a discussion of Section 10’s right of privacy in many of its opinions. As a general proposition, the Court has remained “particularly vigilant and uncompromising in protecting Montanans’ constitutional ‘right to know.’”<sup>11</sup> However, when the Court has failed to vindicate the public’s right to know, it invariably relied on a separate reading of the right of privacy contained in Section 10 and required the requesting litigant to establish a compelling interest to observe the meeting or examine the documents. This “doubling up” has produced anomalies in the enforcement of the right to know and created uncertainty about when the privacy exception to the right of access will be applied to deny access to meetings and documents.

This article reviews the origins of the right to know and privacy, legislative implementation of those rights, and the Supreme Court rulings since ratification of the new Constitution. Other authors have published articles in the Montana Law Review since Gorman. They include Professor Larry Elison and Dennis Nettiksimmons’s oft-cited article on the *Right of Privacy*,<sup>12</sup> Jim Goetz’s *Interpretations of the Montana Constitution: Sometimes Socratic, Sometimes Erratic*,<sup>13</sup> Professor Fritz Snyder’s *The Right to Participate and the Right to Know in Montana*,<sup>14</sup> Snyder and Mae Nan Ellingson’s *The Lawyer-Delegates of the 1972 Montana Constitutional Convention: Their Influence and Importance*,<sup>15</sup> and Adam Wade’s excellent analytical comment, *Billings Gazette v. City of Billings: Examining Montana’s New Exception to the Public’s Right to Know*.<sup>16</sup> This article contains a comprehensive treatment of the decisional law interpreting Article II, Section 9, and examines the circumstances under which the Court has restricted public access, tipping the scale away from the essential purpose of Article II, Section 9, which was to guarantee citizens full access to government decisions.

10. MONT. CONST. art. II, § 9 (emphasis added).

11. *Goldstein v. Commission on Practice of the Supreme Court of Mont.*, 995 P.2d 923, 946 (Mont. 2000) (Nelson, J., dissenting).

12. Larry M. Elison & Dennis Nettiksimmons, *Right of Privacy*, 48 MONT. L. REV. 1 (1987).

13. James H. Goetz, *Interpretations of the Montana Constitution: Sometimes Socratic, Sometimes Erratic*, 51 MONT. L. REV. 289 (1990).

14. Fritz Snyder, *The Right to Participate and the Right to Know in Montana*, 66 MONT. L. REV. 297 (2005).

15. Fritz Snyder & Mae Nan Ellingson, *The Lawyer-Delegates of the 1972 Montana Constitutional Convention: Their Influence and Importance*, 72 MONT. L. REV. 53 (2011).

16. Adam Wade, Note, *Billings Gazette v. City of Billings: Examining Montana’s New Exception to the Public’s Right to Know*, 76 MONT. L. REV. 185 (2015).

## I. POPULISM IN ACTION

After the Second World War, a non-partisan group of professional women and homemakers joined together as the Montana League of Woman Voters, taking the motto “Democracy is not a spectator sport.”<sup>17</sup> The League appeared before the Montana Legislature throughout the late 1950s and 1960s on matters related to open government and public participation. Most of the testimony was given by members who appeared before the Legislature without pay, promoting the public interest. But in 1967, the League sent part-time lobbyists to Helena, one of whom, Dorothy Eck, became a full-time lobbyist in 1969.

During those years, the Montana Legislature was a “good old boy” club. It had few women and was dominated by hard-drinking cowboys in smoke-filled rooms where important legislative policy was made in secret. Until the late 1960s, the lobbyists for the Northern Pacific railroad, the Anaconda Company, and the Montana Power Company made or influenced virtually all legislative decision-making. But the decline of the railroads and the collapse of the copper industry in the late 1960s loosened the grip of corporate interests on the reins of public policy and created a vacuum in Montana politics.

Michael Malone and Richard Roeder described this phenomenon in *Montana, A History of Two Centuries*:

By the late 1960s, Montanans seemed to be changing their minds about their state and about themselves. . . . Unlike previous generations, who had tended to see their future and the future of their children in leaving the state, the newer generation of Montanans found appealing reasons for staying. This attitude expressed itself in a new concern for preserving the environment, a renewed pride in community, and a new interest in reforming and improving society and government. Not since the Progressive Era had Montana seen such widespread popular participation in politics . . .<sup>18</sup>

In 1969, the Legislature sent a referendum to Montana voters calling for a Constitutional Convention.<sup>19</sup> This referendum passed overwhelmingly and in a special election in 1971, Montanans elected 100 delegates to re-write the 1889 Montana Constitution.<sup>20</sup> Not one of these delegates were existing office holders and few had prior legislative experience. Indeed, the delegates were, across the board, highly educated and motivated by public interest, rather than corporate greed. “My God,” said one delegate, “what if

17. About the League, LEAGUE OF WOMEN VOTERS OF MONT., <https://permacc/F468-S4G9> (last revised Jan. 8, 2016).

18. MICHAEL P. MALONE et al., MONTANA: A HISTORY OF TWO CENTURIES 394 (rev. ed. 1991).

19. *Id.*

20. *Id.*

our legislators had been of this caliber over the past decade. We'd be the most progressive state in the Union."<sup>21</sup>

These delegates also had the benefit of other state constitutional revision efforts. Their young, well-educated staff compiled volumes of research on each issue to be resolved in constructing this new charter. Gallatin County elected Dorothy Eck as its delegate.<sup>22</sup> When the Convention met, she was elected to the Convention leadership as Western District Vice President and appointed to the Bill of Rights Committee.<sup>23</sup> Prior to her service as a delegate, Dorothy Eck lobbied for the League, and experienced, first-hand, a governmental apparatus that was closed to public influence. The Convention delegates wrote:

Public trust does not come from just a matter of confidence in the integrity of public officers, but rather it comes from knowing that public affairs are placed in the public eye. This can only occur when the activities of government are visible and when there are ways of checking on what our public officials are doing.<sup>24</sup>

## II. THE RIGHT TO KNOW

Delegate Eck introduced Proposal No. 57, "A Proposal for a New Constitutional Section Providing for Citizen Rights of Access to Government Documents and Procedures."<sup>25</sup> Seven other delegates, including Bob Campbell from Missoula, co-sponsored the proposal.<sup>26</sup> Campbell became the primary sponsor of a subsequent proposal, which eventually became Article II, Section 10, the right to privacy, which added significance to his co-sponsorship for the right to know. The text of Proposal 57 read:

Section \_\_\_\_\_. No person shall be deprived of the right to examine documents or to observe the actions and deliberations of all public officials or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy exceeds the merits of public disclosure.<sup>27</sup>

In approving this proposal, the Bill of Rights Committee recommended passage of the proposal with minor changes:

Section 9. RIGHT TO KNOW. No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demands of individual privacy exceeds the merits of public disclosure.<sup>28</sup>

21. K. ROSS TOOLE, *RAPE OF THE GREAT PLAINS: NORTHWEST AMERICA, CATTLE AND COAL* 214 (1976).

22. 1 MONTANA CONSTITUTIONAL CONVENTION 42 (1979).

23. *Id.* at 25.

24. *Id.* at 462–63.

25. *Id.* at 157.

26. *Id.*

27. *Id.*

28. 2 MONTANA CONSTITUTIONAL CONVENTION 631 (1979).

The Committee Comments reflect the intent and purpose of the provision:

In the main, the provision is from Delegate Proposal 57. It is a companion to the preceding right of participation. Both arise out of the increasing concern of citizens and commentators alike that government's sheer bigness threatens the effective exercise of citizenship. . . . The committee intends by this provision that the deliberation and resolution of all public matters must be subject to public scrutiny. It is urged that this is especially the case in a democratic society wherein the resolution of increasingly complex questions lead to the establishment of a complex and bureaucratic system of administrative agencies. The test of a democratic society is to establish full citizen access in the face of this challenge.<sup>29</sup>

During the Style and Drafting process, the word "clearly" was added to the balancing provision: "except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."<sup>30</sup> According to the sponsor, "clearly" was inserted to assure that the balance would favor disclosure: "[W]e added the word 'clearly', with the intention of tipping the balance in favor of the right to know."<sup>31</sup>

### III. THE RIGHT OF PRIVACY

The Bill of Rights Committee also recommended the adoption of a separate right of privacy. According to the Committee, the purpose of the provision was to "accomplish[ ] . . . the elevation of the judicially-announced right of privacy to explicit Constitutional status."<sup>32</sup> Citing *Griswold v. Connecticut*<sup>33</sup> and *State v. Brecht*,<sup>34</sup> the comment acknowledged that the courts had already recognized this right federally and in Montana.<sup>35</sup> In *Griswold*, the U.S. Supreme Court held that the Connecticut law forbidding use of contraceptives unconstitutionally intruded upon the right of marital privacy.<sup>36</sup> In *Brecht*, the Montana Supreme Court reversed a conviction based on testimony of Brecht's deceased wife's sister that while listening on an extension phone she overheard Brecht allegedly threatening his wife.<sup>37</sup> The district court's admission of this testimony constituted a violation of the right of privacy and was reversible error.<sup>38</sup>

29. *Id.*

30. 1 MONTANA CONSTITUTIONAL CONVENTION, REPORT OF COMM. ON STYLE, DRAFTING, TRANSITION AND SUBMISSION ON SUFFRAGE AND ELECTIONS 11 (1972).

31. 5 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 1670 (1979) [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT].

32. MONTANA CONSTITUTIONAL CONVENTION, *supra* note 28, at 632.

33. 381 U.S. 479 (1965).

34. 485 P.2d 47 (Mont. 1971).

35. MONTANA CONSTITUTIONAL CONVENTION, *supra* note 28, at 632.

36. 381 U.S. at 485.

37. *Brecht*, 485 P.2d at 50.

38. *Id.* at 50.

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Thirteen years later, the Montana Supreme Court overruled *Brecht*, holding that Article II, Section 10, did *not* apply to privacy invasions by non-state actors. In *State v. Long*,<sup>39</sup> the Court concluded that the privacy provision only applied to *state* actions, not those of non-state privacy infringements. The *Long* holding is inconsistent with the Constitutional Bill of Rights Committee comments suggesting that the Legislature may wish to impose additional “safeguards,” such as prohibiting employers from subjecting employees to lie detector tests as a condition of employment.<sup>40</sup>

During the Convention, the recommended privacy language for Article II, Section 10, was drawn from Bob Campbell’s Proposal No. 33 and read:

Section 10. RIGHT OF PRIVACY. The right of privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.<sup>41</sup>

During the floor debates, Delegate George Harper successfully moved to delete the compelling interest standard.<sup>42</sup> Two days later, Delegate Thomas Ask requested Delegate Harper reconsider the deletion of the standard.<sup>43</sup> He explained that it would be impossible to predict how a court would interpret an absolute right of privacy.<sup>44</sup> Delegate Ask explained that adding the compelling interest standard would give direction to the court: “If there’s no compelling state interest, you can’t invade a person’s right of privacy.”<sup>45</sup> After Delegate Wade Joseph Dahood assured the body that the Bill of Rights Committee had no objection to re-inserting the standard, the motion to reconsider passed and Article II, Section 10, reclaimed its compelling interest standard.<sup>46</sup>

It is unclear whether the delegates knew the “compelling interest” concept was a creature of equal protection analysis. “Compelling interest” is the fulcrum of strict scrutiny jurisprudence under state and federal equal protection mandates. Courts have long applied a compelling interest test in measuring whether government action may contravene fundamental rights. The test requires the state or federal government to justify the deprivation “by a compelling state interest and [the law] must be narrowly tailored to effectuate only that compelling interest.”<sup>47</sup> In *Gryczan v. State*, the Court concluded that statutes criminalizing same-sex acts could not meet strict

39. 700 P.2d 153, 156–57 (Mont. 1985).

40. MONTANA CONSTITUTIONAL CONVENTION, *supra* note 28, at 633.

41. *Id.* at 632.

42. CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 31, at 1681–82.

43. 6 CONSTITUTIONAL CONVENTION TRANSCRIPT 1850–51 (1979).

44. *Id.* at 1851.

45. *Id.*

46. *Id.* at 1852.

47. *Gryczan v. State*, 942 P.2d 112, 122 (Mont. 1997) (citing *State v. Siegal*, 934 P.2d 176, 184 (Mont. 1994)).

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scrutiny or a compelling interest under Article II, Section 10.<sup>48</sup> There are only a handful of cases in the history of Anglo-American jurisprudence in which a governmental entity has met its burden to justify a rule under a strict scrutiny analysis.<sup>49</sup> If a statute is subject to strict scrutiny, the statute is nearly always struck down.<sup>50</sup>

Whether or not the Delegates intended to impose a strict scrutiny standard to government intrusions on privacy in Article II, Section 10, it is clear this right of privacy was only designed to “codify” the previously recognized privacy rights under state and federal law. The Delegates created it to protect people from government intrusion in their homes. The spirit of the debates indicate that the Bill of Rights Committee was not enacting a provision governing access to government records and meetings. *That* determination would be made under Article II, Section 9. Otherwise, there would have been no reason to put the balancing test in Article II, Section 9. Additionally, imposing the compelling interest test on public access to documents or meetings changes the entire dynamic of the legal analysis.

#### IV. THE DEBATES

Delegate Eck rephrased the Committee comments when moving to adopt Article II, Section 9. She expressed the concern of citizens and commentators alike, that the government’s enormity threatens the effective exercise of citizenship:

The committee notes this concern and believes that one step which can be taken to change this situation is to *constitutionally presume the openness of government documents and operations*. [Section 9 of Article II] stipulates that persons have the right to examine governmental documents and the deliberation of all public bodies or agencies, except to the extent that the demands of individual privacy clearly outweigh the needs of the public right of disclosure. The provision applies to state government and its subdivisions. The committee intends by this provision that the deliberations and resolution of all public matters must be subject to public scrutiny.<sup>51</sup>

Addressing the tension between the right to know and the right of privacy contained in Article II, Section 9, Delegate Eck explained:

48. *Id.* at 126.

49. See the Montana Supreme Court’s struggle with this concept in *Pfost v. State*, 713 P.2d 495, 500–01 (Mont. 1985), *overruled by* *Meech v. Hillhaven W., Inc.*, 776 P.2d 488 (Mont. 1989). As the Supreme Court in *Arneson v. State ex rel. Dep’t of Admin., Teachers’ Ret. Div.*, 864 P.2d 1245, 1250 (Mont. 1993) recognized, “[i]f a statute invades a ‘fundamental’ right or discriminates against a ‘suspect’ class, it is subject to strict scrutiny.” (quoting *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting)).

50. *But see* *Korematsu v. United States*, 323 U.S. 214, 217–18 (1944) (upholding statute even after subjecting it to a strict scrutiny analysis).

51. CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 31, at 1670 (emphasis added).

We do recognize, however, that there are some cases where the right to know what is in a document that might be classified may exceed the right of privacy. There are times when the right to know what is going on in a deliberation regarding personnel, which ordinarily would be classified and would not be public—we considered it private—but there are times when the public right to know clearly exceeds the individual person's right to privacy in this case. You might have an agency head, for instance, whose dismissal is being considered. If there is—if he is being dismissed for cause, I would think that the public has a right to know that reason of dismissal.<sup>52</sup>

Since the provision was clearly “self-executing,” the Committee appointed the courts as the governmental body responsible for enforcing the public's right to know:

We had assumed that the court also would pretty well define the exceptions; in other words, they would determine what the cases are in which the demands of privacy exceed the demands of public disclosure; and I think it was pretty well the agreement of our committee that we would prefer this method of determination.<sup>53</sup>

Shortly before taking a vote on the proposed Article II, Section 9, Delegate George Heliker inquired of Delegate Dahood as to whether the privacy exception included corporations:

CHAIRMAN GRAYBILL: Mr. Heliker, for what purpose do you arise?

DELEGATE HELIKER: I would like to ask Mr. Dahood a question.

CHAIRMAN GRAYBILL: Okay. (Laughter) Mr. Dahood.

DELEGATE DAHOOD: I yield, Mr. Chairman.

DELEGATE HELIKER: Mr. Dahood, being an ignorant nonlawyer, what is an individual?

DELEGATE DAHOOD: What is an individual?

DELEGATE HELIKER: Is it by any chance also a corporation?

DELEGATE DAHOOD: A person can, of course, Dr. Heliker, as you well know, be defined to include a corporation under the law.

DELEGATE HELIKER: I know a person can, but can an individual?

DELEGATE DAHOOD: An individual, in my judgment, would not be a corporation, no.<sup>54</sup>

There were some Delegates who thought it was more advantageous to authorize the legislature to define the exception.<sup>55</sup> In pursuit of this preference, Delegate Jerry Cate moved to add language to the provision “except as may be provided by law.”<sup>56</sup> He explained his amendment: “[i]t has the effect of putting the Legislature in as the arbiter of the cases excepted.”<sup>57</sup>

Before Delegate Cate's amendment was considered, however, Delegate Fred Martin made a substitute motion to delete the right-to-know sec-

52. *Id.* at 1670–71.

53. *Id.* at 1671.

54. *Id.* at 1680.

55. *Id.* at 1671.

56. *Id.*

57. *Id.*

tion in its entirety.<sup>58</sup> Delegate Martin was a career newsman who, at the time of his service in the Convention, was the editor of the *Livingston Enterprise* and *Park County News*.<sup>59</sup> While the Montana Press Association appeared in support of the provision earlier when it was heard in the Bill of Rights Committee, it now called the provision the “right-to-conceal” and was lobbying hard to kill it.<sup>60</sup> The concern was that the exception for individual privacy was a loophole that “could be interpreted to allow almost any public board, agency or administrator to cover up vital private matters.”<sup>61</sup> The newspapers thought the public would be served better without any constitutional provision at all.<sup>62</sup> In 1963, the press had successfully engineered the passage of § 82-3401 of the Revised Codes of Montana, which required open meetings subject to a list of exceptions,<sup>63</sup> preferring to take chances with the Legislature rather than the courts.<sup>64</sup> However, Delegate Martin’s substitute motion was rejected on a vote of 76-14.<sup>65</sup>

Thereafter, the Convention debated and voted on Delegate Cate’s motion to let the Legislature define what would be open or closed to the public.<sup>66</sup> His motion drew more votes than Delegate Martin’s had, but the motion still failed 56-30.<sup>67</sup> Delegate Eck’s motion to adopt the right-to-know provision as reported by the Bill of Rights Committee passed on a voice vote.<sup>68</sup>

As the Convention continued its business constructing the rest of the new charter, the Montana news media relentlessly pressured the delegates to abandon the right-to-know section. Indeed, almost all of the daily newspapers editorialized against the provision. The harshest criticism was expressed in an editorial published on the front page of the *Billings Gazette*, in which the editor threatened that opposition to this right-to-know provision would jeopardize ratification of the entire Constitution.<sup>69</sup>

Concerned that this threat might be realized, the Chair of the Bill of Rights Committee, Delegate Dahood, moved to reconsider the section during the Style and Drafting sessions of the Convention.<sup>70</sup> He did so to insert language which would give the Legislature the power to define the bounds

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58. *Id.* at 1672.

59. MONTANA CONSTITUTIONAL CONVENTION, *supra* note 22, at 52.

60. CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 31, at 1672.

61. *Id.*

62. *Id.* at 1672–73.

63. *Id.* at 1670.

64. *Id.* at 1671.

65. *Id.* at 1676.

66. *Id.* at 1677–79.

67. *Id.* at 1679.

68. *Id.* at 1680.

69. 7 CONSTITUTIONAL CONVENTION TRANSCRIPT 2488 (1979).

70. *Id.* at 2484.

of privacy which would justify closing a meeting or denying access to a document.<sup>71</sup> Delegate Dahood proposed to insert, in lieu of the privacy exception, the phrase: “except in cases in which the Legislature, subject to court interpretation, shall have determined that the demands of individual privacy exceed the merits of public disclosure.”<sup>72</sup> The original sponsor of the proposal, Delegate Eck, supported Delegate Dahood’s amendment.<sup>73</sup>

Before the Convention could vote on that amendment, Delegate Carl Davis, the long-time Beaverhead County Attorney, moved to delete the entire section.<sup>74</sup> He reasoned the Legislature would implement the right to know, whether or not it was specifically authorized to do so. He thought deletion of the entire section would let the press “go and lobby the Legislature on how they want this done.”<sup>75</sup> His motion failed 56-33, but the proposed deletion received 19 more votes than Delegate Martin’s earlier motion.<sup>76</sup>

Considerable discussion on the Dahood motion ensued. Delegate Donald R. Foster argued in support of the amendment because of concerted pressure from the newspapers.<sup>77</sup> He did not think the amendment made any substantive change, but was willing to accept it to ameliorate the press.<sup>78</sup> Some opposed the motion because of the heavy media lobbying. Some opposed based on a mistrust of the Legislature. Delegate Noel D. Furlong contended, tongue in cheek, that the best option was to eliminate freedom of the press altogether. He felt the original provision “has to do with the right of the people, the little guy, to find out what’s going on, and I resist the motion to be stampeded into changing this thing . . . . The press will take care of itself, lets [sic] us take care of the people.”<sup>79</sup>

President Leo Graybill yielded the chair to Delegate Magnus Aasheim so he could speak on the motion.<sup>80</sup> Of all the speakers that afternoon, President Graybill articulated the clearest rationale for the section as it was originally proposed and adopted:

What’s going to happen is the Legislature’s going to pass a statute of some kind, that’s going to list all of the incidences that it thinks should be secret. Now if you know the Legislature as I do, they’re not going to do that in one line; there’s going to be a lot of different things that are secret. They’re going to have the same trouble we’re going to have, or we’re having. They’re going

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71. *Id.*

72. *Id.*

73. *Id.* at 2488–89.

74. *Id.* at 2491–92.

75. *Id.* at 2492.

76. *Id.* at 2493.

77. *Id.* at 2494.

78. *Id.*

79. *Id.* at 2493.

80. *Id.* at 2496.

to put a lot of words in that statute. And when somebody comes to the agency and wants to know—let’s say it’s the reporter or let’s say it’s a person—when they come to the agency and want to know, or when they try to get into the agency meeting, who’s the first person that’s going to interpret the Legislature’s language? It ain’t going to be the courts, it’s going to be the agency. So the more language you give that agency to work with, the less to know there’s going to be left, because they’ll be able to interpret it right out of the window. So if the press really wants to lock this state up, just let them have the Legislature pass a nice, long-as-your-arm statute about what’s secret; and everything will be secret by the time the agency, or the agency head, or the agency lawyer get his hands on it and advises whether the people can come to the meeting or whether the papers can be shown to the press. I don’t think the press has yet thought this thing through. The press has to go and demand what it wants, and if an agency makes an unreasonable determination, the press has to take them to court and whip them; that’s the only way this thing’s going to work. But the way the committee originally drew it, at least the little guy’s got something to say to that agency man when he goes to the door; he’s got the Constitution. But he hasn’t got anything when we get through amending it. So I think, Mr. Foster, you could do the press a big favor, and I’m sure we could all help Mr. Furlong protect the people, if they’ll just let us write the Constitution and they’ll write the articles.<sup>81</sup>

Even with the majority of the Bill of Rights Committee voting aye on the motion to put the Legislature in charge of implementing the privacy exception, it failed, 70-18.<sup>82</sup> As a result, the judiciary would decide when and under what circumstances the right-to-know guarantee would be trumped by a right of privacy. The original language of Article II, Section 9, was adopted and voters ratified the new Constitution in November of 1972.

The Convention transcript of the debates on the new right-to-know guarantees shows how the delegates envisioned it would be applied. The section, like its neighbors in the Bill of Rights, is clearly self-executing. The resounding defeat of Delegate Cate’s initial amendment, and Delegate Dahood’s later proposal to put the Legislature in charge of what would be private, emphasizes that reading. The Convention delegates intended to start with a balance tipped in favor of openness (“clearly exceeds”) and the courts would enforce the guarantee:

DELEGATE WILSON [to Delegate Berg]: Would you foresee a lot of litigation, separate litigations on these particular issues?

DELEGATE BERG: No, I foresee that there will be litigation. I foresee that there will be interpretations, and that final decisions will be achieved through the courts.<sup>83</sup>

81. *Id.* at 2496–97.

82. *Id.* at 2498.

83. *Id.* at 2501.

## V. THE LEGISLATURE

When the Legislature met in 1973, subcommittees were formed to work during the interim between the 1973 and 1974 annual sessions to prepare any necessary legislation precipitated by the new Constitution. The Subcommittee on Constitution, Elections, and Federal Relations was commissioned to “conduct a detailed study leading to draft legislation implementing article II, sections 8 and 9 of the 1972 Montana constitution.”<sup>84</sup>

The study was completed in December of 1973.<sup>85</sup> It concluded that while Article II, Section 9, was self-executing: “[t]here is no inherent prohibition in the section itself against any statute or regulation which deprived a person of the right to observe public deliberations or documents as long as (1) the statute or rule was consistent with the proviso protecting individual privacy and (2) authorized a case by case determination as to whether the demands of individual privacy exceeded the merits of disclosure.”<sup>86</sup> However, the purpose of the study was to determine whether existing statutes were valid in view of the new constitutional provision.<sup>87</sup>

The study identified three categories of existing statutory law governing the right to know: “(1) those that authorized closed meetings, (2) those that protect documents in the custody of a public body which relate to individual people, and (3) those that protect documents in the custody of a public body which relate to corporations.”<sup>88</sup> In the first category was Rev. Codes of Mont. § 75–6127 (permitting school boards to close collective bargaining strategy sessions) and § 82–3402 (requiring open meetings subject to certain exceptions).<sup>89</sup>

According to the study, because § 75–6127 did not involve a question of individual privacy, it “clearly violates the ‘right to know’ and should be repealed.”<sup>90</sup> Section 82–3402 authorized a closed meeting when the discussion pertained to:

1. National or state security;
2. Disciplining of a public officer or employee;
3. Employment, appointment, promotion, dismissal, demotion or resignation of any public officer or employee;

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84. S. J. Res. 1, 43d Cong. (Mont. 1972).

85. SUBCOMM. ON CONSTITUTION, ELECTIONS & FED. RELATIONS, RIGHT TO KNOW, RIGHT TO PARTICIPATE, INTERIM STUDY (Mont. 1973) [hereinafter RIGHT TO KNOW, RIGHT TO PARTICIPATE INTERIM STUDY].

86. *Id.* at 7–8.

87. *Id.* at 1, 7.

88. *Id.* 8.

89. *Id.*

90. *Id.*

4. Purchasing of public property, investing of public funds which might adversely affect the public security of financial interest of state or political subdivisions of the state;
5. Revocation of any license of any person licensed under the state;
6. Law enforcement, crime prevention probation or parole.<sup>91</sup>

According to the study, “[i]tems one and four do not in any way relate to individual privacy. . . . The items, then, are clearly unconstitutional.”<sup>92</sup> Items two, three, five and six do relate to individual privacy and would have to be determined on a case-by-case basis “to determine whether: 1. The case involved a question of individual privacy, and 2. whether the demands of individual privacy clearly exceeded the merits of public disclosure.”<sup>93</sup> Since the statute created absolute exceptions, not subject to the discretionary language of the new constitutional provision, amendments to existing statutes were necessary to comply with the new constitutional guarantee. Those amendments would, at a minimum, contain: (1) “A definition of what constitutes a ‘deliberation,’” (2) “A method of enforcing the provision,” and (3) “A general statement authorizing the body holding the meeting” or agency possessing a record to make the balancing test on a case-by-case basis.<sup>94</sup> At the time, the Legislature did not consider (nor has it ever considered) establishing a set of factors by which privacy and disclosure would be balanced. The Legislature seemed to presume the courts would undertake this task on a case-by-case basis.

The study also identified statutes protecting documents concerning natural persons, e.g. Rev. Codes of Mont. § 7–147 (records of borrowers of building and loan associations), § 10–703 (adoption records), § 48–139 (marriage applications), and § 71–1520 (welfare records).<sup>95</sup> Indeed, the study listed 28 separate statutes prohibiting release of certain public records.<sup>96</sup> There were also at least 15 separate statutes under which records of corporations could not be publicly disclosed: § 3–709 (bean dealer records), § 3–1721 (commercial fertilizer records), § 50–1221 (hard-rock mining permit applications), § 84–3406 (records of produce dealers), etc.<sup>97</sup>

According to the study, it was necessary to distinguish between laws governing natural persons and corporations because the Convention debates made it clear that a corporation was not an “individual” with protected pri-

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91. *Id.* at 8–9.

92. *Id.* at 9.

93. *Id.*

94. *Id.*

95. *Id.* at 9–11.

96. *Id.* at 9–12.

97. *Id.* at 16–17.

vacy interests under Article II, Section 9.<sup>98</sup> The Heliker/Dahood exchange, *supra*, was quoted verbatim in the study.<sup>99</sup> Unfortunately, before legislative action was taken on the study, Attorney General Robert Woodahl issued an official AG opinion construing the word “individual” in Article II, Section 9, to apply to corporations as well as natural persons.<sup>100</sup>

Two “implementation” bills accompanied the report.<sup>101</sup> One recast the existing open meeting statute by imposing the Article II, Section 9, constitutional mandate, providing a definition of “deliberation” (two or more members of a body discussing public business) and “public body” (any policy-making body of the State or its subdivisions, including bodies “supported in whole or in part by public funds”) and imposing a criminal penalty for violation of the right to know.<sup>102</sup> Sections 82–3402 and 75–6127 of the Revised Codes of Montana were both repealed under the bill.<sup>103</sup>

The second bill implemented the right-to-examine-documents portion of Article II, Section 9.<sup>104</sup> Its operative provision established a process by which the custodian of a document would disclose a document containing information related to individual privacy.<sup>105</sup> The constitutional balancing test was included in the statute. The balancing test additionally required the custodian of the document to notify the individual about whom the information pertained that the custodian would release the document unless the individual (within five days of the notice) established that the demands of privacy clearly exceeded the merits of disclosure.<sup>106</sup> All records of any public body, without exception, were covered by the bill.<sup>107</sup> Forty-one existing confidentiality statutes would be repealed, including those related to marriage and adoption records.<sup>108</sup>

The bills (H.B. 720 and 721) were assigned to Rep. Michael Greely to carry in the 1974 second annual session. Both bills passed the house, but were killed in the Senate.<sup>109</sup> Constituent groups of those protected by the respective confidentiality statutes vigorously opposed the open records bill. Opposition to the open records bill, particularly by the adoptive parents’

98. It took the Montana Supreme Court thirty years to arrive at this conclusion and to cite the same Convention debate transcript relied upon in the 1973 study. *Great Falls Tribune v. Montana Pub. Serv. Comm’n*, 82 P.3d 876, 881–83 (Mont. 2003).

99. RIGHT TO KNOW, RIGHT TO PARTICIPATE INTERIM STUDY, *supra* note 85, at 15.

100. Mont. Att’y Gen. Op. 19, 35; Mont. Att’y Gen. Op. 45, 48 (1973).

101. H.R. 720, 43d Leg., Spec. Sess. (Mont. 1974); H.R. 721, 43d Leg., Spec. Sess. (Mont. 1974).

102. Mont. H.R. 720, at 1.

103. H. JOURNAL, 43d Leg., Spec. Sess. 25 (Mont. 1974).

104. Mont. H.R. 721.

105. *Id.* at § 2.

106. *Id.* at §§ 2–3.

107. *Id.* at § 3.

108. MONT. H. JOURNAL, 43d Leg., Spec. Sess., at 25.

109. Rev. Codes of Mont. 1947, 83 (1977).



organization, was so vociferous that Greely, a popular Cascade County native in an overwhelmingly Democratic county, came within fifteen votes of losing his bid for election to the Montana Senate in the fall of 1974 (Greely received 1,756 votes. His opponent, Dr. M.F. Keller, received 1,742.).<sup>110</sup>

In the 1975 session of the Montana Legislature, HB 412 was introduced. HB 412 was virtually identical to HB 720 from the previous session. HB 412 passed the Legislature.<sup>111</sup> The bill also added a provision to the criminal code making it “official misconduct” to close a meeting in violation of the law.<sup>112</sup> In 1977, HB 302 again amended Rev. Codes of Mont. § 82–3402 by deleting the specific exceptions and adding a general balancing test similar to Article II, Section 9.<sup>113</sup> This general section also contained a provision authorizing an individual to waive the right of privacy, causing the meeting to be open.<sup>114</sup> However, it also permitted closing a meeting when a public body discussed collective bargaining or litigation strategy.<sup>115</sup> It included a new section defining a meeting as the convening of a quorum of the body either in person or by electronic means.<sup>116</sup> Cell phones and email were still in the future in 1977. An enforcement feature was also added permitting a district court to set aside a decision made in violation of the law.<sup>117</sup> Interestingly, the Senate amended the bill to exclude the Legislature’s caucuses and conference committees.<sup>118</sup> A conference committee rejected this effort. (Ironically, the conference committee meeting was held without any public notice as allowed by legislative rules at the time.) The bill adopted in 1977 remains the law today, with a few minor changes made in the subsequent 40 years.

## VI. THE COURTS

Since the task of giving life to Article II, Section 9, was left to the courts, the success or failure of achieving the purposes of the constitutional guarantee can be measured by its treatment by the judiciary. Eight years passed before the Montana Supreme Court had the occasion to address its first right-to-know dispute.

110. Secretary of State Election returns, General Election 1974, S324.2021 S2g (on file with the Secretary of State).

111. 1975 Mont. Laws 1237.

112. *Id.* at 1237–38.

113. 1977 Mont. Laws 1237.

114. *Id.*

115. *Id.* at 1886.

116. *Id.* at 1887.

117. *Id.*

118. Mont. Code Ann. § 82–3402 (1977).

The *Worden*<sup>119</sup> case arose when two governmental bodies tussled over whether the county violated the public's right to know. The Yellowstone County Commission had held a public hearing over a proposed subdivision. Two days after the hearing, the Commission conducted a telephonic meeting where the subdivision was approved. One of the commissioners did not receive notice of this conference call and did not participate. When the local school board impacted by the subdivision learned of this approval it commenced a mandamus action seeking to nullify the decision because it was made in closed session.<sup>120</sup> A number of significant access issues were presented and resolved by the Supreme Court in this case of first impression. First, the Court determined that mandamus was not an appropriate method of addressing an open meetings violation, and suggested a simple petition for relief as a better device.<sup>121</sup> Second, the Court found that so long as a quorum was present during the telephonic conference, it was still a "meeting" covered by the open meetings laws.<sup>122</sup> Third, the Court rejected the county's contention that the telephonic meeting did not need to be noticed, because it was merely a continuation of the meeting about which adequate notice was given.<sup>123</sup> The Court held:

In Montana, notice is required by sections 2-3-103 and 7-5-2122, MCA. The contested "meeting" here failed to comply with the notice requirements of both those sections. Respondents contend that the newspaper story printed in the "Yellowstone County News" and the fact that they held public meetings under the Montana Subdivision and Platting Act sufficiently complied with the above notice provisions. This interpretation of the facts and the law is mistaken. The newspaper article did not provide sufficient facts concerning the "meeting's" time and place to inform the public sufficiently prior to the final decision to permit further public comment on the matter. . . . It is difficult to envision an open meeting held without public notice that still accomplishes the legislative purpose of the Montana "open meeting" statutes. Without public notice, an open meeting is open in theory only, not in practice. This type of clandestine meeting violates the spirit and the letter of the Montana Open Meeting Law.<sup>124</sup>

Several months later, the Court issued an opinion concluding that, "Art. II, Sec. 9 clearly provides that any person has the constitutional right to observe court proceedings unless the demand of individual privacy clearly exceeds the merits of public disclosure."<sup>125</sup> Moreover, the Court concluded, "[f]rom the foregoing it is apparent that the Montana Constitu-

119. Board of Trs., Huntley Project Sch. Dist. No. 24, *Worden v. Board of Cnty. Comm'rs of Yellowstone Cnty.*, 606 P.2d 1069, 1073 (Mont. 1980).

120. *Id.* at 1070.

121. *Id.* at 1074–75.

122. *Id.* at 1073.

123. *Id.* at 1073–74.

124. *Id.* at 1073.

125. *Great Falls Tribune v. District Court of Eighth Judicial Dist.*, 608 P.2d 116, 119 (Mont. 1980).

tion imposes a stricter standard in order to authorize closure than does the United States Constitution. Art. II, Sec. 9 of the Montana Constitution has no counterpart in the Federal Constitution.”<sup>126</sup> The Court imposed a finding of “strict and irreparable necessity” to preserve fair trial rights before a criminal *voir dire* could be closed to the public.<sup>127</sup> These first two Supreme Court decisions reflect an abiding commitment by the Court to give the broadest reading to the public’s right to know.

However, in its next three opinions issued over the following two years the Court did the opposite. In 1981, in *Mountain States Telephone & Telegraph Co. v. Department of Public Service Regulation*,<sup>128</sup> the Court concluded that a corporation was protected by the individual right of privacy, and its records could be withheld from public disclosure under Article II, Section 9. Unfortunately, neither party to the case cited the Convention debates, which clearly demonstrated an intent that the right of privacy only extend to natural persons and not corporations.

To make matters worse, the Court coupled the “compelling state interest” concept with its analyses under Article II, Section 9:

We are reinforced in this conclusion [that corporate records were subject to individual privacy] by Mont. Const., Art. II, 10, which states: “The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.” Showing a compelling state interest is an equal protection test, and it comes into play if the statute or State Constitution affects a fundamental right.<sup>129</sup>

A year later, the Court rendered a decision that would have far-reaching implications for open government. In *Montana Human Rights Division v. City of Billings*,<sup>130</sup> the Court adopted an analytical standard for determining whether, and to what extent, documents retained by a governmental entity were protected from disclosure under Article II, Section 10. In the course of investigating a charge of discrimination against the City of Billings, the Montana Human Rights Commission (MHRC) subpoenaed employment files for city employees. The city refused to provide the information unless MHRC obtained consent to disclose from each employee. The city contended that these files contained many matters which most individuals would not willingly disclose publicly. Accordingly, this information was protected by Article II, Section 10.<sup>131</sup>

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126. *Id.* at 120.

127. *Id.* at 120–21.

128. 634 P.2d 181, 188–89 (Mont. 1981), *overruled by* Great Falls Tribune v. Montana Pub. Serv. Comm’n, 82 P.3d 876, 883 (Mont. 2003).

129. *Id.* at 188.

130. 649 P.2d 1283 (Mont. 1982).

131. *Id.* at 1285–88.

Unfortunately, in resolving the case, the Court cited David Gorman's 1978 Montana Law Review article and concluded that the subpoena could only be enforced if there was a compelling state interest.<sup>132</sup> The Court then applied the Fourth Amendment standard, adopted by the U.S. Supreme Court in *Katz v. United States*,<sup>133</sup> for evaluating if information is protected. This standard is whether the party involved subjectively expected the information to be private, and whether society is willing to recognize that expectation as reasonable.<sup>134</sup>

Applying this standard, the Court found that the information requested by the MHRC was subject to the protection of Montana's constitutional right of privacy, articulated in Section 10 of the Montana Constitution.<sup>135</sup> And, while the Court concluded that an investigation of discrimination by MHRC constituted a "compelling state interest" justifying the subpoena, the records would be disclosed only under a strict protective order preventing public disclosure.<sup>136</sup>

Ultimately, the Court was asked to determine whether records in the custody of a local government entity were subject to disclosure.<sup>137</sup> Although another governmental agency made the request, the issue should have triggered the accepted analysis under Article II, Section 9. Instead, the Court resolved the case by applying the "compelling interest" test of Article II, Section 10.<sup>138</sup> The Court in *Montana Human Rights Division*, did not examine or even cite the disclosure guarantees of the right to know. This oversight is significant because the Supreme Court has cited the *Montana Human Rights Division* decision in almost every subsequent opinion construing public access to meetings or documents under Article II, Section 9.

That same year, the Court again weakened the thrust of the right to know in *State ex rel. Smith v. District Court of Eighth Judicial District*.<sup>139</sup> The issue in *Smith* was whether, and to what extent, fair trial rights could justify closure of a pre-trial suppression hearing.<sup>140</sup> As discussed above, the Court in *Great Falls Tribune v. District Court of Eighth Judicial District*, concluded that only "strict and irreparable necessity" could justify closing *voir dire* to the public.<sup>141</sup> In *Smith*, the Court held that the public and press

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132. *Id.* at 1286.

133. 389 U.S. 347, 351–352 (1967).

134. *Id.*

135. Mont. Human Rights Div. v. Billings, 649 P.2d 1283, 1287–88 (Mont. 1982).

136. *Id.* at 1291.

137. *Id.* at 1284–85.

138. *Id.* at 1285–86.

139. 654 P.2d 982, 987 (Mont. 1982).

140. *Id.* at 985.

141. *Id.* (citing *Great Falls Tribune v. District Court of Eighth Judicial Dist.*, 608 P.2d 116, 120–21 (Mont. 1980)).

could be excluded from a suppression hearing “only if dissemination of information acquired at the hearing would create a clear and present danger to the fairness of defendant’s trial and no reasonable alternative means can be utilized to avoid the prejudicial effect of such information.”<sup>142</sup>

The Court grafted this “clear and present danger” test from the American Bar Association’s recommended practice in federal courts under the First and Sixth Amendments to the U.S. Constitution.<sup>143</sup> Adoption of this test retreats from the Court’s pronouncement in *Great Falls Tribune* two years earlier that Article II, Section 9 affords broader access guarantees than the U.S. Constitution.<sup>144</sup> While still imposing a difficult standard for closure of court proceedings, *Smith*’s “clear and present danger” test clearly provides a lower bar than “strict and irreparable necessity.”

In 1983, the Supreme Court first addressed the closing of a local school board meeting to discuss a personnel matter. In *Jarussi v. Board of Trustees of School District No. 28, Lake County*,<sup>145</sup> the Court narrowly focused its scrutiny. The school board closed the meeting to exclude an employee, not the general public.<sup>146</sup> The district justified excluding a teacher it planned to fire based on the collective bargaining exception to the open meeting statute.<sup>147</sup> While the dispute giving rise to the case did not involve public access, the Court recognized that the collective bargaining exception was inapplicable:

If we were to adopt the Board’s interpretation of collective bargaining, another avenue would be available to close public meetings. This undermines the policy of the Open Meeting Law and is contrary to the legislative mandate that the open meeting provisions should be liberally construed.<sup>148</sup>

*Jarussi* added two important principles to the law of public access under Article II, Section 9. First, it breathed life into the statutory direction that open meeting laws be construed liberally. Second, it voided the decision made in the closed session. The invalidation caused the board to miss its statutory deadline for dismissing teachers and resulted in extending the teacher’s contract for another year. This provided a financial incentive for school boards to follow the open meetings laws.

In 1984, the Court again doubled up the privacy analysis under Article II, Section 9 with the compelling interest analysis under Article II, Section 10.<sup>149</sup> The *Missoulian* newspaper sued the Board of Regents for the state

142. *Id.* at 987.

143. *Id.*

144. *District Court of Eighth Judicial Dist.*, 608 P.2d at 120–21.

145. 664 P.2d 316 (Mont. 1983).

146. *Id.* at 317.

147. *Id.* at 319.

148. *Id.* at 320.

149. *Missoulian v. Board of Regents of Higher Educ.*, 675 P.2d 962, 970–71 (Mont. 1984).

universities to gain access to the periodic evaluations the board performed of the various presidents in the university system.<sup>150</sup> “The discussions centered on personal relationships and personalities, subjective evaluation of various personnel or faculty, and the presidents’ management style, methodology and decision-making approach. Other areas of discussion included family, health, personal plans, relationships with Board members and faculty-administration relations.”<sup>151</sup> The *Missoulian* wanted to observe these discussions to report to its readers how these public officials were performing.<sup>152</sup> The *Missoulian* argued that university presidents can have no reasonable expectation of privacy except in the narrow areas of personal health and family that do not affect job performance.<sup>153</sup>

The Court rejected this argument and reiterated its holding in *Montana Human Rights Division*, “that a privacy interest will yield only to a compelling state interest.”<sup>154</sup> The Court then announced it would “balance the competing constitutional interests in the context of the facts of each case, to determine whether the demands of individual privacy clearly exceed the merits of public disclosure. Under this standard, the right to know *may* outweigh the right of individual privacy, depending on the facts.”<sup>155</sup>

The Court concluded that the demands of individual privacy of the presidents clearly exceeded the merits of public disclosure.<sup>156</sup> But in relying on its compelling interest analysis in *Montana Human Rights Division* and an expanded view of “the merits of public disclosure” the Court turned the right to observe on its head, finding that there was a public interest in closing evaluations: “[b]ut a broader inquiry is required by the constitutional and statutory provisions and has been employed by this Court in previous cases.”<sup>157</sup> The Court appeared to conclude that there was substantial public value in a closed evaluation and also appeared to agree with the lower court’s observation that “frank, honest and critical evaluations would not occur without confidentiality” and, accordingly, closed meetings actually served the public interest.<sup>158</sup> This, of course, is the rationale all public officials use to justify closed meetings, and is directly contrary to the stated purposes of Article II, Section 9.

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150. *Id.* at 966.

151. *Id.*

152. *Id.* at 964.

153. *Id.* at 967.

154. *Id.* at 971.

155. *Missoulian*, 675 P.2d at 971 (first emphasis added, second emphasis in original).

156. *Id.* at 973.

157. *Id.* at 971.

158. *Id.* at 972.

Three years passed before the Court addressed another challenge to denial of access. In *Belth v. Bennett*,<sup>159</sup> the Court relied on its prior holdings to conclude that a corporation is entitled to privacy protections, and, based on *Missoulian*, *Montana Human Rights Division*, and *Mountain States Telephone & Telegraph Co.*, that the demands of individual privacy of insurance companies outweigh the merits of public disclosure. However, Justice John Sheehy issued a stinging dissent, joined by Justice William Hunt, excoriating the majority's thinking that the public need not know information in the hands of the auditor regarding the health of insurance companies.<sup>160</sup>

Two years later, in *Engrav v. Cragun*,<sup>161</sup> the Court applied its "compelling interest" jurisprudence in affirming a district court's conclusion that a student's request for certain criminal justice information does not constitute a compelling interest necessary to disclosure:

Privacy rights of individuals in Montana are more substantial than the rights guaranteed in the United States Constitution. *Montana Human Rights Division*, 649 P.2d at 1286. Before this Court will invade the individual privacy of the persons involved, a compelling state interest to do so must be found. There is no compelling state interest here which allows the dissemination of the requested information. Appellant wishes to do a study for a school research project; this is not a sufficient state interest.<sup>162</sup>

In that same year, and in the face of the Court's continual doubling up on right-to-know prerequisites by insisting that the requestor satisfy the compelling interest test, the Court reversed course in *Great Falls Tribune Co. v. Cascade County Sheriff*.<sup>163</sup> The Tribune had been covering a story involving the abuse of a prisoner by the city police and county sheriff deputies. The officers were disciplined by their respective employers. The Tribune asked for the names of the officers. The sheriff complied, but the city refused to disclose the names of the officers, citing individual privacy. The Tribune sued and the district court ordered the city police chief to disclose the names. The task on appeal for the Tribune was to overcome the compelling interest effect of *Montana Human Rights Division*, *Missoulian*, *Belth*, and *Engrav*. The Tribune argued and the district court agreed that it simply was "not good public policy to recognize an expectation of privacy in protecting the identity of a law enforcement officer whose conduct is sufficiently reprehensible to merit discipline."<sup>164</sup>

The Court reviewed the four precedential cases, but elected to devise a new analysis which considered the nature of the public employee's job

159. 740 P.2d 638, 639 (Mont. 1987).

160. *Id.* at 644–45 (Sheehy, J., dissenting).

161. 769 P.2d 1224, 1229 (Mont. 1989).

162. *Id.* at 1229.

163. 775 P.2d 1267 (Mont. 1989).

164. *Id.* at 1267–69.

when determining the weight of privacy rights in the balancing test under Article II, Section 9:

The law enforcement officers in the present case may have had a subjective or actual expectation of privacy relating to the disciplinary proceedings against them. However, law enforcement officers occupy positions of great public trust. Whatever privacy interest the officers have in the release of their names as having been disciplined, it is not one which society recognizes as a strong right . . . . The conduct of our law enforcement officers is a sensitive matter so that if they engage in conduct resulting in discipline for misconduct in the line of duty, the public should know. We conclude that the public's right to know in this situation represents a compelling state interest.<sup>165</sup>

While the Court continued to apply the “compelling interest” test of Section 10, it created a new approach to measure the weight of the privacy right dependent on the role the individual played in society. If the individual asserting the right of privacy occupied a position of public trust and had engaged in conduct contravening that trust, the individual had diminished privacy rights which would not outweigh the merits of public disclosure under the compelling interest standard. *Great Falls Tribune* spawned a progeny of cases in which the Court tipped the balance in favor of disclosure of records related to individuals in positions of public trust whose conduct violates that trust.<sup>166</sup>

Later in that year, the Court decided a case based on the balancing test set forth in Article II, Section 9—without relying on Article II, Section 10—ruling that an insurance company was entitled to copies of an accident report maintained by the Billings police department involving one of its insured:

As the language of the right to know provision indicates, the tension between these two guarantees is aggravated by the fact that they are textually interdependent. In general, all citizens have an absolute right to observe and examine the operation of agencies within government. Curtailment of this right is only justified “in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.”<sup>167</sup>

The compelling interest provision of Article II, Section 10 was not relied upon by the Court in applying the provisions of the right to know.<sup>168</sup> Although *Lacy* is rarely cited in the annals of right-to-know jurisprudence, it marks a turning point in the Court's approach to Article II, Section 9, away from the doubling up of the Article II, Section 10 compelling interest concept and toward implementation of the self-executing provisions of Article II, Section 9 by itself.

165. *Id.* at 1269.

166. See *infra* cases discussed.

167. *Lacy v. City of Billings*, 780 P.2d 186, 187–88 (Mont. 1989).

168. *Id.* at 187–89.



A year later, the Court considered an open meetings issue in the *pro se* appeal of Robert Flesh in *Flesh v. Board of Trustees of Joint School District No. 2, Mineral & Missoula Counties*.<sup>169</sup> Flesh, an Alberton resident, was upset about an article an assistant administrator had written criticizing his conduct. Flesh filed a grievance against the administrator. The board considered the grievance in a session closed to the public and then deliberated in private. Flesh did not seek to void the meeting; rather, he sought a declaratory order that the board not close its meetings in the future. However, since Flesh challenged the closure within the appropriate statute of limitations, the district court considered the merits of the claim and denied relief.<sup>170</sup> On appeal, the Court reverted to the privacy rights test devised in *Missoulain* and *Montana Human Rights Division* that it called a “two-part test”: “(1) whether the person involved had a subjective or actual expectation of privacy; and (2) whether society is willing to recognize that expectation as reasonable.”<sup>171</sup> The Court concluded the administrator had an expectation of privacy over the grievance hearing, and society recognized that right as reasonable.<sup>172</sup> The opinion summarily disposed of the constitutional balancing test, saying, “In this case there is no showing of any public interest to be served by a public meeting but a substantial showing of a legitimate employee privacy interest to be protected by closing the meeting.”<sup>173</sup> The Court seemed unimpressed by Flesh’s *pro se* claims and instead placed its entire focus on the right of privacy.

The next three right-to-know cases decided by the Court were facial challenges to several exceptions contained in the statutory open meetings law. In *Associated Press v. Board of Public Education*,<sup>174</sup> the Court struck down the litigation strategy exception as it applied to legal disputes between two governmental entities. Holding that Article II, Section 9 is “unique, clear and unequivocal” the Court found that the statutory authorization to close a meeting to discuss litigation strategy violated the guarantee.<sup>175</sup> In *Associated Press v. State*,<sup>176</sup> the Court concluded that Montana Code Annotated § 46–11–701(6), authorizing the sealing of an affidavit in support of leave to file a criminal charge, impermissibly closes records otherwise required to be open under Article II, Section 9. Finally, in *Great Falls Tribune Co. v. Great Falls Public School, Board of Trustees, Cascade*

169. 786 P.2d 4, 5–6 (Mont. 1990).

170. *Id.* at 7.

171. *Id.* at 8.

172. *Id.* at 9.

173. *Id.*

174. 804 P.2d 376 (Mont. 1991).

175. *Id.* at 379.

176. 820 P.2d 421 (Mont. 1991), *abrogated by* Plumb v. Fourth Judicial Dist. Court, Missoula Cnty., 927 P.2d 1011 (Mont. 1996).

*County*,<sup>177</sup> the Court struck down the collective bargaining strategy exception of Montana Code Annotated § 2–3–203(4), concluding, “the collective bargaining strategy exception is an impermissible attempt by the Legislature to extend the grounds upon which a meeting may be closed.”<sup>178</sup>

In 1992, the Court revisited the jurisprudence governing access to personnel records in *Citizens to Recall Mayor James Whitlock v. Whitlock*.<sup>179</sup> There, the plaintiffs sought access to an investigatory report into sexual misconduct allegations brought by the city judge against the Mayor of Hamilton.<sup>180</sup> Recognizing that “[t]his is not the first time we have suggested that public officials may occupy unique positions in regard to expectation of privacy,”<sup>181</sup> the Court drew from its earlier ruling in *Great Falls Tribune v. Cascade County Sheriff*, and concluded that an elected official is “properly subject to public scrutiny in the performance of his duties . . . In this case, the sexual harassment allegations against Whitlock go directly to the mayor’s, and another government official’s, abilities to properly carry out their duties. Information related to the ability to perform public duties should not be withheld from public scrutiny.”<sup>182</sup>

The Court also held that its earlier rulings protecting personnel files were inapposite because the plaintiffs here sought records related to an investigation into misconduct:

However, in this case, the Toole Report was the result of an investigation commissioned to explore allegations of misconduct. The Citizens Group is not seeking disclosure of information related to private sexual activity, general performance evaluations, or proceedings where Whitlock’s character, integrity, honesty, or personality were discussed. While Whitlock might reasonably expect privacy in regard to those kinds of matters, society will not permit complete privacy and unaccountability when an elected official is accused of sexually harassing public employees or of other misconduct related to the performance of his official duties.<sup>183</sup>

A year later, the Court applied this doctrine to police investigatory records involving a Bozeman police officer accused of sexual assault of another officer while attending the police academy. In *Bozeman Daily Chronicle v. City of Bozeman Police Department*,<sup>184</sup> Justice James Nelson, who would write the Court’s most resolute opinions vindicating the public’s right to know, ordered the release of the investigatory report. His opinion starts with “the now-familiar two-part test to determine whether an individ-

177. 841 P.2d 502 (Mont. 1992).

178. *Id.* at 505.

179. 844 P.2d 74 (Mont. 1992).

180. *Id.* at 76.

181. *Id.* at 78.

182. *Id.* at 77–78.

183. *Id.* at 78.

184. 859 P.2d 435 (Mont. 1993).

ual has a protected privacy interest under Article II, Section 10, of the Montana Constitution.”<sup>185</sup> He reasoned that while the *Chronicle* had a right to know, the inquiry does not stop there.<sup>186</sup> “We must, of necessity, also consider the constitutional limitation of the right to privacy on the *Chronicle*’s right to know.”<sup>187</sup> Following the rulings on *Great Falls Tribune* and *Whitlock*, the Court held that since the misconduct went directly to the police officer’s breach of his position of public trust, his conduct is a proper matter for public scrutiny.<sup>188</sup> In so doing, Justice Nelson had to reconcile the Court’s earlier decisions in *Engrav* and *Allstate*.

In the remand order, the Court required the district court to conduct an *in camera* inspection to determine whether any portions of the investigatory report were entitled to be “redacted” to protect the privacy of the victim and any witnesses.<sup>189</sup> In so doing, the Court applied the two-part test, concluding that while the police officer did not have a right of privacy in the report, the victims and witnesses did; further, in executing this *in camera* obligation, the district court had to apply the balancing test of Article II, Section 9 against a diminished right of privacy, redacting only information related to third party witnesses.<sup>190</sup>

The Court moved from this two-step analysis to a three-step analysis a few years later. In 1995, the Court decided *Becky v. Butte-Silver Bow School District No. 1*.<sup>191</sup> There, petitioner-parents sought records disclosing why their son was not selected to the National Honor Society at Butte High.<sup>192</sup> While the Court concluded that the records belonged to the National Honor Society and not the district and were therefore not “public records,” it nonetheless analyzed the case under Article II, Section 9, announcing a three-step analysis:

First, we consider whether the provision applies to the particular political subdivision against whom enforcement is sought. Second, we determine whether the documents in question are “documents of public bodies” subject to public inspection. Finally, if the first two requirements are satisfied, we decide whether a privacy interest is present, and if so, whether the demand of individual privacy clearly exceeds the merits of public disclosure.<sup>193</sup>

Next, in 1998, the Court addressed whether the government could close a meeting or withhold access to documents in order to get the “best

185. *Id.* at 439 (citing *Great Falls Tribune Co. v. Cascade Cnty. Sheriff*, 775 P.2d 1267, 1268 (Mont. 1989)).

186. *Id.*

187. *Id.*

188. *Id.* at 440–41.

189. *Id.* at 442.

190. *Bozeman Daily Chronicle*, 859 P.2d at 441–42.

191. 906 P.2d 193 (Mont. 1995).

192. *Id.* at 194.

193. *Id.* at 196.

deal” for the taxpayers of Montana. In *Great Falls Tribune Co. v. Day*,<sup>194</sup> the Court determined that under the plain language of Article II, Section 9, a governmental entity could not deny the public the opportunity to observe its deliberations and inspect public documents to gain an economic benefit because “[e]conomic advantage is not a privacy interest.”<sup>195</sup>

Later that same year, the Court held that records of a state prison inmate were “documents of public bodies” within the meaning of Article II, Section 9.<sup>196</sup> It reiterated the necessary procedure when a request for copies of such documents was made.

We hold that the Inmates’ parole files are documents of a public body to which the right to know applies. We determine that once a party requests access to an Inmate’s file, it is incumbent upon the Board of Pardons to assert the privacy and penological interests involved. Only where the Board of Pardons or reviewing court determines that “the demand of individual privacy clearly exceeds the merits of public disclosure,” Art. II, § 9, Mont. Const., or that a legitimate penological interest is served by nondisclosure, may access to an Inmate’s parole files be denied.<sup>197</sup>

Since a “penological interest” is not specifically mentioned in Article II, Section 9, it is difficult to reconcile *Worden* with *Great Falls Tribune v. Day*. If the plain language of the right-to-know provision cannot be read to include consideration of an economic benefit, it is difficult to understand how a penological interest could be read into the privacy exception.

In the last decision rendered by the Court in 1998, the Court reverted to its doubling up rationale, holding that Article II, Section 9 must be “balanced” by the right of privacy contained in Article II, Section 10. In *Lincoln County Commission v. Nixon*,<sup>198</sup> the Court reversed a district court dismissal of claim filed by Lincoln County commissioners to obtain access to a criminal investigative file without examining the documents *in camera*. Since the Court made no decision on the merits, the doubling up in the Court’s opinion had no substantive impact on the outcome of the case.

The following year, the Court addressed its own obligations under Article II, Section 9 in *In re Selection of a Fifth Member to Montana Districting*.<sup>199</sup> The issue arose when the Court undertook its obligation to appoint a fifth member of the reapportionment commission. Before the Court deliberated on its appointment, Justice Nelson moved for the Court to deliberate in open session. It was his view that Article II, Section 9 applied to all govern-

194. 959 P.2d 508, 513–14 (Mont. 1998).

195. *Id.* at 514.

196. *Worden v. Montana Bd. of Pardons & Parole*, 962 P.2d 1157, 1161–62 (Mont. 1998).

197. *Id.* at 1165.

198. *Lincoln Cnty. Comm’n v. Nixon*, 968 P.2d 1141, 1145 (Mont. 1998).

199. *In re Selection of a Fifth Member to Montana Districting*, 1999 WL 608661 (Mont. Aug. 3, 1999).

mental bodies, including the Supreme Court. His motion failed 5-2. Justice Nelson agreed with the candidate ultimately selected by the Court, but dissented from the Court's decision to deliberate in private.<sup>200</sup> He wrote:

Hence, not only the plain language but also the constitutional history of these companion provisions of the Montana Constitution show that Article II, Section 9, is broader than Article II, Section 8. Article II, Section 9, gives the public the right to observe the deliberations of all public bodies and agencies while Article II, Section 8, gives the public the right to participate only in the operations of agencies. That, of course, begs the question whether this Court is a "public body." The answer to this question is undeniably "yes."<sup>201</sup>

Justice Terry Trieweler joined Justice Nelson in calling for open deliberations by the Court. Justice Jim Regnier wrote an opinion in which he disagreed with the dissenting opinions of Justices Nelson and Trieweler. While giving lip service to open government ("I also join my colleagues, Justices Nelson and Trieweler, in their strong belief in open government. It is not only the right view, it is mandated by our Constitution."), he disagreed, nonetheless.<sup>202</sup> He acknowledged that the Court has been "vigilant and uncompromising in rejecting other governmental bodies' attempts to limit or subvert this right," but said he did not believe that Article II, Section 9 of Montana's Constitution applied to the deliberations of the Montana Supreme Court.<sup>203</sup>

This same split on the Court manifested two years later in *Goldstein v. Commission on Practice of Supreme Court*,<sup>204</sup> where a majority of the Court refused to apply the right-to-know provision to the Court. The two attorneys in Goldstein attacked the confidentiality provisions of the deliberations of the Court's Commission on Practice.<sup>205</sup> The attorneys argued that the Court's rule on confidentiality of Commission proceedings violated their right to know under Article II, Section 9 of Montana's Constitution.<sup>206</sup> The Court summarily rejected this argument, citing the majority views of Justices Regnier and Leaphart in *In re Selection of a Fifth Member to Montana Districting*.<sup>207</sup> Justice Nelson, of course, wrote a thorough and thoughtful dissent.<sup>208</sup> He started the dissent with a pithy observation: "Montana is the Last Best Place for many things. In terms of a constitutionally

200. *Id.* at \*1.

201. *Id.* at \*3.

202. *Id.* at \*9-10 (Regnier, J., concurring).

203. *Id.*

204. 995 P.2d 923, 931 (Mont. 2000).

205. *Id.* at 925.

206. *Id.* at 931.

207. *Id.* at 931-32 (citing *In re Selection of a Fifth Member to Montana Districting*, 1999 WL 608661 (Mont. Aug. 3, 1999)).

208. *Id.* at 932-48 (Nelson, J., dissenting).

sufficient lawyer disciplinary system, however, Montana is simply last!”<sup>209</sup> He believed that the Court was “clearly an ‘entity . . . of the . . . judicial branch of this state,’ and, therefore a ‘governmental body’” within the meaning of Article II, Section 9.<sup>210</sup> “It also ‘necessarily follows,’” he concluded, “that the COP, as the disciplinary arm of the judicial branch of government, is an agency of state government to which Article II, Section 9, applies.”<sup>211</sup>

In *Associated Press, Inc. v. Montana Department of Revenue*,<sup>212</sup> the Court reiterated that access claims require “a balancing of the competing constitutional interests *in the context of the facts of each case*, to determine whether the demands of individual privacy clearly exceed the merits of public disclosure.” Accordingly, any government rule, policy, or statute that prohibits access to information retained by the agency without adherence to the constitutionally mandated balancing test is invalid on its face. Justice Nelson filed a separate concurring opinion in the case citing the *Heliker/Dahood* exchange during the Convention debates and concluded that corporations were not entitled to protections under the Montana right of privacy because that right belongs only to natural persons.<sup>213</sup>

In its third ruling in 2000 construing Article II, Section 9, the Court reverted to its earlier analysis, short-shrifting the right to know by favoring the right of privacy contained in Article II, Section 10. In *Pengra v. State*,<sup>214</sup> the claimant, the father of an injured daughter, asserted the right of privacy on behalf of his daughter and sought a court order sealing the settlement documents. At the time, Montana Code Annotated § 2–9–303 required that the settlement of all tort claims against a governmental entity be open.<sup>215</sup> The father asked the district court to seal the settlement documents, arguing that the statute violated his daughter’s right to privacy.<sup>216</sup> Looking to its early rulings in *Engrav* and *Montana Human Rights Commission*, the Court characterized the constitutional issue, stating that statutes which conflict with the Montana Constitution are subordinate to the constitution and the Court must interpret these conflicting statutes to harmonize with the constitution.<sup>217</sup> “This leads inexorably to the larger question concerning the conflict here presented between the constitutional right to privacy and the

209. *Id.* at 933.

210. *Goldstein*, 995 P.2d at 945 (quoting MONT. CODE ANN. § 18–4–123(11) (2015)).

211. *Id.* (quoting *Great Falls Tribune Co. v. Day*, 959 P.2d 508, 512 (Mont. 1998) (Nelson, J., dissenting)).

212. 4 P.3d 5 (Mont. 2000).

213. *Id.* at 22 (Nelson, J., concurring).

214. 14 P.3d 499, 503 (Mont. 2000).

215. *Id.* at 501 (quoting MONT. CODE ANN. § 2–9–303 (2000)).

216. *Id.* at 500.

217. *Id.* at 502.

constitutional right to know.”<sup>218</sup> Nonetheless, the Court concluded that the father failed to prove that his daughter’s privacy interests were implicated by disclosure of the settlement documents and found a compelling state interest in disclosure of settlement amounts in tort actions with the State:

Disclosure of such agreements provides an irreplaceable opportunity for taxpayers to assess the seriousness of unlawful and negligent activities of their public institutions. The taxpayers are entitled to know how much they must pay for such actions or inactions. And without muzzling the entire legislative process and all those involved in obtaining the appropriation to pay the claim, it appears that whatever privacy right the settling party has will be compromised, anyway, when the legislature appropriates the funds to pay the settlement.<sup>219</sup>

In 2002, the Court held that an *ad hoc* committee formed for the purpose of advising the trustees of a Billings school district about the closure of several Yellowstone County schools was subject to the open meetings laws, reversing a district court determination that since the committee only had one member of the school board it was not a subcommittee of the board subject to Montana Code Annotated § 2–3–201.<sup>220</sup> The trustee member of the group had written an analysis of the issue involved in closing the various schools.<sup>221</sup> After the group made its recommendations about closure to the Board, one of the parents (the Petitioner in the case) discovered that the group had relied on the trustee’s analysis which had been withheld from the public.<sup>222</sup> She argued that withholding the analysis not only deprived her of her rights under Article II, Section 9, but also her right to participate under Article II, Section 8.<sup>223</sup> The Court ruled that “Article II, Section 9, is broader in application than Article II, Section 8. Article II, Section 9, applies to public bodies as well as governmental agencies.”<sup>224</sup> The Court defined a “public or governmental body” to include “a group of individuals organized for a governmental or public purpose.”<sup>225</sup> The Court agreed, concluding that Petitioner’s right to know and participate were both denied by the board, and the remedy was to void the board’s closure decisions.<sup>226</sup>

Finally, in 2003, thirty years after the ratification of Article II, Section 9, the Court reversed itself on whether corporations were entitled to privacy protections. Central to the issue resolved in *Great Falls Tribune v. Montana*

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218. *Id.*

219. *Id.* at 503.

220. *Bryan v. Yellowstone Cnty. Elementary Sch. Dist.*, 60 P.3d 381, 384–94 (Mont. 2002).

221. *Id.* at 384–85.

222. *Id.* at 385.

223. *Id.* at 388.

224. *Id.* at 387.

225. *Id.*

226. *Bryan*, 60 P.3d at 392–94.

*Public Service Commission*<sup>227</sup> was a Public Service Commission (PSC) rule which sealed all information submitted by a public utility in support of rate changes, unless an objector could show that it was not entitled to “trade secret” protections from disclosure under the due process clause. Neither the Montana Power Company nor the PSC asserted a right of privacy as a basis for keeping the information confidential. Nonetheless, the Court took the case as an opportunity to reverse the *Mountain States* decision that corporations were not protected by Article II, Section 9 or Section 10.<sup>228</sup> However, the significance of the case was the Court’s reliance on Delegate Eck’s explanation of the purpose of Article II, Section 9, that government records, whether supplied by private entities or generated by the government itself, were *presumed* to be open for public inspection.<sup>229</sup> The PSC rule that automatically shielded utility filings from public disclosure overstepped the Montana Constitution. Justice Nelson again filed a special concurrence expressing his concern that permitting a “trade secret” to justify confidentiality was a slippery slope unless the Court narrowly interpreted the term.<sup>230</sup>

In *Jefferson County v. Montana Standard*,<sup>231</sup> the county sought declaratory judgment on the newspaper’s request for disclosure of information regarding the arrest of a county commissioner who entered a guilty plea to driving under the influence of alcohol and driving with an expired license. The district court ordered disclosure.<sup>232</sup> The county commissioner appealed.<sup>233</sup> The Court held that any expectation the county commissioner had as to the privacy of information regarding her arrest was unreasonable.<sup>234</sup> Thus, the right-to-privacy provision of the Montana Constitution did not preclude disclosure of such information to newspapers pursuant to the right-to-know provision of the Montana Constitution.<sup>235</sup> Acknowledging that the rights granted under the right-to-know provision are not absolute, the Court concluded that the right-to-privacy provision of the Montana Constitution limits the right to receive confidential criminal justice information.<sup>236</sup> Accordingly, the *Montana Standard*’s constitutional right to know must be balanced against the county commissioner’s constitutional right to privacy under Article II, Section 10. However, the Court did not mention

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227. 82 P.3d 876 (Mont. 2003).

228. *Id.* at 882–83.

229. *Id.* at 885.

230. *Id.* at 890 (Nelson, J., concurring).

231. 79 P.3d 805, 807 (Mont. 2003).

232. *Id.*

233. *Id.*

234. *Id.* at 809.

235. *Id.*

236. *Id.* at 808 (citing *Bozeman Daily Chronicle v. City of Bozeman Police Dep’t*, 859 P.2d 435, 439 (Mont. 1993); *Lacy v. City of Billings*, 780 P.2d 186, 188 (Mont. 1989)).



the compelling interest test in its ruling. The Court simply followed the public trust doctrine and applied the Article II, Section 9, balancing test to determine the records should be disclosed.

In *Associated Press v. Crofts*,<sup>237</sup> the Court faced an open meetings dispute in which the Commissioner of Higher Education had formed an *ad hoc* “policy committee” to discuss matters directly related to the governance of the university system. The committee discussed issues such as: policy changes; tuition and fee changes; budgeting issues; contractual issues; employee salaries; and legislative initiatives. The policy committee also advised the Commissioner on matters related to these issues. The Commissioner argued that because the committee was not a formalized governmental body, it was not subject to the open meetings laws.<sup>238</sup>

The Court rejected this argument and devised a test for determining when such *ad hoc* bodies must comply with Montana’s open meetings laws:

We conclude that under Montana’s constitution and statutes, which must be liberally interpreted in favor of openness, factors to consider when determining if a particular committee’s meetings are required to be open to the public include: (1) whether the committee’s members are public employees acting in their official capacity; (2) whether the meetings are paid for with public funds; (3) the frequency of the meetings; (4) whether the committee deliberates rather than simply gathers facts and reports; (5) whether the deliberations concern matters of policy rather than merely ministerial or administrative functions; (6) whether the committee’s members have executive authority and experience; and (7) the result of the meetings.<sup>239</sup>

In *Svaldi v. Anaconda–Deer Lodge County*,<sup>240</sup> the Court held that a public school teacher entrusted with the care and instruction of children held a position of public trust and, therefore, the public had a right to view records from an investigation into the teacher’s abuse of students.<sup>241</sup> The case arose in an unusual manner. The plaintiff-teacher sued the county for invasion of privacy caused by the county attorney’s disclosure of a deferred prosecution in a criminal case involving alleged abusive behavior by the teacher toward some of her pupils.<sup>242</sup> The plaintiff cited *Engrav* to show that until charges were actually filed, a potential defendant retains privacy rights.<sup>243</sup> The Court rejected this argument and relied on *Great Falls Tribune* and *Whitlock* to conclude that as a teacher entrusted with the care and instruction of children, the plaintiff had a position of public trust, thus the

237. 89 P.3d 971, 975 (Mont. 2004).

238. *Id.* at 975.

239. *Id.* at 975–76.

240. 106 P.3d 548 (Mont. 2005).

241. *Id.* at 553 (citing *Great Falls Tribune Co. v. Cascade Cnty. Sheriff*, 775 P.2d 1267, 1269 (Mont. 1989); *Citizens to Recall Whitlock v. Whitlock*, 844 P.2d 74, 77 (Mont. 1992)).

242. *Id.* at 550.

243. *Id.* at 551–52 (citing *Engrav v. Cragun*, 769 P.2d 1224, 1228 (Mont. 1989)).

allegations of misconduct went directly to her public duties.<sup>244</sup> The Court made no mention of the compelling interest test.

The Court also affirmed the district court's grant of summary judgment on the teacher's privacy claims, noting:

Svaldi cannot seriously claim her privacy rights were violated by the release of the initial offense report when it was already public knowledge that the allegations were against her, what the allegations were, who was involved as complainants, that she was the subject of a School Board investigation concerning the allegations, and that her intended retirement from teaching was connected to these same allegations. Grayson was justified in releasing the report.<sup>245</sup>

The Montana Supreme Court heard its next case concerning privacy and the right to know in 2005. *Yellowstone County v. Billings Gazette*,<sup>246</sup> arose because the *Gazette* had been covering a dispute among the employees of the Yellowstone County public defender's office involving allegations of discrimination and sexual harassment. The antagonist chief public defender was deposed in a lawsuit brought by an employee who had been terminated. The *Gazette* asked the county for a copy of the deposition. The county, hoping to avoid an award of attorney fees, filed a declaratory judgment action against the *Gazette*, asking the district court to engage in the balancing test. The district court released the deposition but in a significantly redacted form. The *Gazette* appealed.<sup>247</sup>

In reversing the district court, the Court characterized earlier rulings as creating a judicial rule that: "society is not willing to recognize as reasonable the privacy interest of individuals who hold positions of public trust when the information sought bears on that individual's ability to perform public duties."<sup>248</sup> Applying this rule, the Court held the deponent, as Interim Chief Public Defender for Yellowstone County, held a position of public trust and was charged with safeguarding the public's fundamental constitutional rights to counsel, a fair and speedy trial, preserving public confidence in the judicial system, and preserving these rights for every member of society. Consequently, the Court held, the Interim Chief Public Defender's subjective expectation of privacy was diminished in matters involving his official duties. The Court ordered disclosure of the deposition with names of third party witnesses redacted. In passing, the Court cited the compelling interest requirement of Article II, Section 10, but did not apply

244. *Id.* at 553 (citing *Cascade Cnty. Sheriff*, 775 P.2d at 1269; *Citizens to Recall Whitlock*, 844 P.2d at 77).

245. *Id.*

246. 143 P.3d 135, 137 (Mont. 2006).

247. *Id.* at 138–39.

248. *Id.* at 140 (citing *Cascade Cnty. Sheriff*, 775 P.2d at 1269; *City of Bozeman Police Dep't*, 859 P.2d at 440–41; *Svaldi v. Anaconda-Deer Lodge Cnty.*, 106 P.3d 548, 553 (Mont. 2005)).

the test or conclude that the county had a compelling interest in disclosing the deposition.<sup>249</sup>

It was not until 2006, 34 years after ratification of the Constitution, that the Court recognized the fallacy of coupling Article II, Section 9, right-to-know reasoning with the compelling interest requirement of Section 10. In *T.L.S. v. Montana Advocacy Program*,<sup>250</sup> a case rarely cited in subsequent decisions, the Court rejected the doubling-up effect of demanding a requestor establish a “compelling interest” in the records as a component of the balancing test under Article II, Section 9. Instead, the Court denied relief based on the proposition that the right to privacy guaranteed by Article II, Section 10, must be balanced in light of the facts of each case. The Court recognized that in performing the balancing test, the district court had combined the language contained in Article II, Sections 9 and 10, forcing the requestor to establish a compelling state interest in releasing the sealed court documents sufficient to outweigh T.L.S.’s privacy interests in those documents. Since the Montana Advocacy Program had not established a compelling state interest, the district court denied the motion for leave to release the documents.<sup>251</sup> On appeal, the Court finally disposed of the doubling-up standard by ruling:

[T]he constitutional right to examine documents of public bodies is presumed in the absence of a showing of individual privacy rights sufficient to override that right. Thus, once it is determined that requested documents are documents of public bodies subject to public inspection pursuant to Article II, Section 9, it is incumbent upon the party asserting individual privacy rights to establish that the privacy interests clearly exceed the merits of public disclosure.<sup>252</sup>

The Court concluded the district court erred by demanding the requestor establish a compelling state interest warranting public disclosure of the sealed court documents under the third step of the Article II, Section 9, analysis.<sup>253</sup>

In the ten years following the Court’s clear and unambiguous decision in *T.L.S.*, it has only been cited twice, and neither case cited the Court’s rejection of the compelling interest test in right-to-know jurisprudence.<sup>254</sup> Instead, the Court continued to emphasize the Article II, Section 10, compelling interest standard when evaluating right-to-know cases. It is appar-

249. *Id.* at 139–41.

250. 144 P.3d 818 (Mont. 2006).

251. *Id.* at 824–25.

252. *Id.* at 824.

253. *Id.* at 825.

254. *Montana Police Protective Ass’n v. Public Emp. Ret. Bd.*, No. BDV-2007-852, 2008 Mont. Dist. LEXIS 288 at \*8 (July 10, 2008); *State v. McClelland*, 357 P.3d 906, 909 (Mont. 2015).

ently easier for the Court to ignore the ruling when considering a balancing analysis that favors closure of a meeting or document.

In *Board of Trustees, Cut Bank Public Schools v. Cut Bank Pioneer Press*,<sup>255</sup> the Court first addressed the federal law related to the privacy of student records. After an altercation on school grounds, the *Pioneer Press* requested information from the local school board about the discipline imposed on the offending students.<sup>256</sup> The board refused to provide the information after determining that the students' rights to privacy clearly exceeded the merits of public disclosure. The district court, however, considered the records to be protected under the Family Educational Rights and Privacy Act (FERPA).<sup>257</sup> *Pioneer* contended that FERPA did not protect the information it has requested because "FERPA does not prohibit disclosure of redacted records," rather, it only prohibits the disclosure of "personally identifiable information."<sup>258</sup> *Pioneer* argued in the alternative that "even if FERPA did protect the records at issue," FERPA did not preempt the Montana Constitution.<sup>259</sup> The district court disagreed, and dismissed the case; *Pioneer* appealed.<sup>260</sup> The Court reversed, holding that FERPA did not prevent disclosure of the requested information.<sup>261</sup> The Court then applied the three-step analysis and concluded that while a student privacy interest existed, society would recognize this privacy interest as reasonable and it did not clearly outweigh the merits of disclosure.<sup>262</sup>

In 2006, the *Billings Gazette* requested from the Commission on Practice (Commission) and the Office of Disciplinary Counsel (ODC) documents relating to the discipline of a former Billings City Attorney.<sup>263</sup> Citing the Rules of Lawyer Disciplinary Enforcement (RLDE), the ODC declined to provide the documents.<sup>264</sup> At the time, the RLDE permitted an attorney to make a "conditional admission" of the misconduct and accept discipline, thereby rendering the records related to the charges wholly confidential.<sup>265</sup> In May 2006, the *Gazette* filed a petition to obtain the records, arguing that the City Attorney was vested with public trust and the misconduct involved a violation of that trust, resulting in a diminished right of privacy.<sup>266</sup> The district court declined to grant relief upon grounds that it did not have the

255. 160 P.3d 482, 486 (Mont. 2007).

256. *Id.* at 484.

257. *Id.* at 483.

258. *Id.* at 486.

259. *Id.*

260. *Id.* at 484.

261. *Cut Bank Pioneer Press*, 160 P.3d at 488.

262. *Id.* at 488–89.

263. *Billings Gazette v. Commission on Practice ex rel. State*, 190 P.3d 1126, 1128 (Mont. 2008).

264. *Id.*

265. *Id.* at 1129; see MONT. R. LAWYER DISCIPLINARY ENFORCEMENT 20, 26.

266. *Billings Gazette*, 190 P.3d at 1128.

authority to order the Commission or the ODC to release documents protected by rules promulgated by the Montana Supreme Court under its constitutional authority.<sup>267</sup> On appeal, the Court avoided the right-to-know issue, holding that since the Supreme Court had exclusive jurisdiction over lawyer discipline and had adopted the ODC rules, the district court lacked authority to grant the requested relief.<sup>268</sup> At the time the case was submitted, Attorney General Mike McGrath defended the ODC.<sup>269</sup>

Later that year, Attorney General McGrath was elected Chief Justice of the Montana Supreme Court, and the *Gazette* filed a declaratory judgment original proceeding, facially challenging the RLDE as violative of Article II, Section 9.<sup>270</sup> The Court again dodged the issue, declining to take original jurisdiction, but acknowledging that the *Gazette*'s petition had "arguable merit."<sup>271</sup> The Court entered an order initiating a public rule-making process.<sup>272</sup> The *Gazette* was invited to participate in that process.<sup>273</sup> The first proposed rule offered by the Court completely eliminated the confidential "conditional admission" and opened the entire disciplinary process. The ODC could continue to issue private "non-disciplinary" letters of caution in limited cases.<sup>274</sup> The Court continued this rule-making process over the next two years and inexplicably adopted a final rule which retained all of the confidentiality treatments of the original rule.<sup>275</sup> The new rules still permitted an attorney to make a conditional admission, in which case all of the background information would be kept confidential.<sup>276</sup> The only change was that in cases of a "conditional admission" only those disciplines labeled as "public" would be made public.<sup>277</sup> The Court still retained the ability to impose "private admonitions," but subjected the determination of whether to impose private discipline to the balancing test of Article II, Section 9.<sup>278</sup>

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267. *Id.*

268. *Id.* at 1128–29.

269. *Id.* at 1126.

270. Petition for Declaratory Relief at \*4, *In re the Supreme Court Rule on Attorney Discipline*, <https://perma.cc/H3BS-N7Y6> (Nov. 3, 2008) (No. OP 08-0556).

271. *In re Supreme Court Rule on Attorney Discipline*, No. OP 08-0556, 2008 Mont. LEXIS 709, at \*2 (Nov. 26, 2008).

272. *Id.* at \*2.

273. *Id.* at \*2–3.

274. *In re Revising the Rules for Lawyer Disciplinary Enforcement*, No. AF 06-0628, Order at \*4 (Mont. Nov. 9 2010), <https://supremecourtdocket.mt.gov/view/AF%2006-0628%20Rule%20Change%20-%20Order?id={9B125C7E-A6D2-48D1-A02E-5A4564E155BA}> (Nelson, J., dissenting).

275. *Id.*

276. MONT. R. LAWYER DISCIPLINARY ENFORCEMENT 20(B)(3), 26(D).

277. *Id.* at 20(B)(3).

278. *Id.* at 13.

Justice Nelson dissented from the order imposing the new disciplinary rules.<sup>279</sup> He characterized the two-year process thus: “we are essentially back to where we started—at square one.”<sup>280</sup> Justice Nelson wrote:

If we expect the public to respect Montana’s lawyer disciplinary system, if we strive to instill universal confidence in the process, fairness and effectiveness of that system, if we are truly serious about demonstrating that the policing of our own profession actually works, then making the entire disciplinary process transparent is an indispensable step in obtaining these goals.<sup>281</sup>

He believed the new RLDE fell well short of achieving these goals and was constitutionally impermissible. Accordingly, the RLDE remained “translucent.”<sup>282</sup>

During the two years the Court considered its attorney disciplinary rule changes, it conducted open sessions in which it heard from various interested parties and actually deliberated on these rules openly.<sup>283</sup> While the Court elected to keep the curtain drawn on attorney disciplines, it began to shed light on its own internal processes. It was during this time that the Court began to open meetings in which “administrative” decisions unrelated to its appellate duties were discussed. This practice continues to date. The Court provides agendas for these meetings and holds its conferences concerning administrative matters in open session.

In *Billings Gazette v. City of Billings*,<sup>284</sup> the Court dealt with a records request for disclosure of a “due process” letter to a police department employee detailing evidence gathered in investigation of the former employee’s alleged misuse of a city credit card.<sup>285</sup> While the employee had authorization to use the card, the employee was not high in the police department hierarchy.<sup>286</sup> The district court performed the two-pronged balancing test concluding that the employee’s job, while not high in the police department, allowed her to spend large amounts of public monies and was, therefore, a “position of trust.”<sup>287</sup> The court then determined the employee did not have a reasonable privacy expectation in the results of an formal internal investigation into wrongdoing associated with her alleged mishandling those funds.<sup>288</sup>

On its review of the district court ruling, the Court began its discussion by citing the *Montana Human Rights Division* and *Missoulia* rulings, not-

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279. *In re Revising the Rules for Lawyer Disciplinary Enforcement*, at \*2.

280. *Id.* at \*4.

281. *Id.*

282. *Id.*

283. *Id.*

284. 267 P.3d 11, 15 (Mont. 2011).

285. *Id.* at 13.

286. *Id.* at 13–14.

287. *Id.* at 14.

288. *Id.*

ing, “[t]he public’s right to know, however, must be balanced with an individual’s right to privacy. . . . Since our 1972 Constitution was adopted, we have recognized that the only exception to the restriction against the invasion of individual privacy is a compelling state interest.”<sup>289</sup> However, the majority in a 4-3 decision determined that the district court did not err in balancing the rights, and declined to apply the Court’s prior jurisprudence finding an employee’s right to privacy was paramount.

It bears noting that the Gazette is not seeking her personnel file; it is seeking only the due process letter which all parties agree constitutes a public document. Neither Anthony’s status nor her reasonable expectations are logically akin to those of the innocuous job applicants in *Montana Human Rights* or the university presidents undergoing a routine performance evaluation in *Missoulian*. We do not seek to undermine our holdings in either case. Rather, we distinguish the cases on the basis of their disparate facts.<sup>290</sup>

Chief Justice McGrath cast the crucial fourth vote for the majority, but expressed concern that the public trust determination ought not be made based on the nature of the employees’ duties (precisely what the district court had done below).<sup>291</sup> But, the Chief noted in his concurring opinion:

Courts should not conclude that merely holding a government position that involves the expenditure of public funds automatically places that person in a “position of public trust,” trumping the potential expectation of privacy that employee has in the subject matter of a personnel investigation conducted by her employer.<sup>292</sup>

In his dissent, Justice Brian Morris, joined by Justices Beth Baker and James Rice, relied heavily on *Missoulian*, *Montana Human Rights Division* and *Belth* and, without expressly applying the compelling interest test, argued that the majority ruling “adds nothing to the balancing of public rights and private interests inherent in Art. II, Sections 9 and 10 of Montana’s Constitution when applied to disclosure of personnel related documents.”<sup>293</sup> Justice Morris believed that “[t]he character of the documents at issue should control the outcome of the balancing test rather than the position of the person about whom the documents pertained.”<sup>294</sup> Moreover, Justice Morris argued that confidentiality was a public employer’s “strongest weapon to control wrongdoing in the workplace.”<sup>295</sup> He felt secrecy, not open government, promoted candid communication between an employer and an employee; he believed this secrecy constituted good public policy

289. *Id.* at 15 (citing *Montana Human Rights Div. v. Billings*, 649 P.2d 1283, 1288 (Mont. 1982)).

290. *Billings Gazette*, 267 P.3d at 17.

291. *Id.* at 18–19 (McGrath, C.J., concurring).

292. *Id.* at 19.

293. *Id.* at 20–23 (Morris, J., dissenting).

294. *Id.* at 20.

295. *Id.* at 22.

and served as a basis for a reasonable expectation of privacy in the clerk's due process letter:

The Court's refusal to recognize this privacy interest will encourage employees in future cases to remain silent during an internal investigation. This silence will hinder the effectiveness of a *Garrity* warning, and, more importantly, prevent an employer from taking quick action to ensure the integrity of public institutions. Innumerable situations—from sexual harassment to allegations of embezzlement—may require a public employer to take swift action to control a workplace. Today's decision likely will limit a public employer's ability to take swift corrective action.<sup>296</sup>

The *Billings Gazette* case revealed a deeply divided Court. Only a thin majority favored openness, with the Chief Justice holding the swing vote.

Two years later, the Court reversed a district court order that the City of Billings disclose an unredacted disciplinary file on five employees disciplined for viewing pornography on their work computers. In *Billings Gazette v. City of Billings*,<sup>297</sup> the Court appeared to follow Justice McGrath's cautionary concurring opinion from the 2011 *Billings Gazette* case, and because the employees were not vested with public trust, they had undiminished expectations of privacy in their disciplinary files.

The majority opinion starts with an ominous observation:

Montana's right to privacy is established in Article II, Section 10 of the Montana Constitution: "*Right of privacy*. The right of individual privacy is essential to the wellbeing of a free society and shall not be infringed without the showing of a compelling state interest."<sup>298</sup>

The majority then cites with approval the early decisional law supporting confidentiality.<sup>299</sup> Drawing heavily from *Missoulain* and *Montana Human Rights Division*, Justice Rice, writing for the majority, concluded, "[h]ere, the Employees are not elected officials, high-level management, or department heads, nor is there evidence that any specific duty alleged to have been violated related to the performance of a public trust function."<sup>300</sup>

Accordingly, the Court held:

[S]ociety would be willing to accept as reasonable a public employee's expectation of privacy in his or her identity with respect to internal disciplinary matters when that employee is not in a position of public trust, and the misconduct resulting in the discipline was not a violation of a duty requiring a high level of public trust.<sup>301</sup>

Arriving at this conclusion, Justice Rice knew the Court was departing from well-established precedent. He painstakingly went through each of the

296. *Billings Gazette*, 267 P.3d at 22 (Morris, J., dissenting).

297. 313 P.3d 129 (Mont. 2013).

298. *Id.* at 133 (quoting MONT. CONST. art. II, § 10).

299. *Id.* at 135–36.

300. *Id.* at 140.

301. *Id.*



Court's prior decisions and attempted to find factors that could distinguish the Court's holding.<sup>302</sup> Ultimately, Justice Rice ended the analysis by creating a new class of "administrative employees" who have a higher expectation of privacy in misconduct than elected officials or high-level employees.<sup>303</sup> This sleight of hand became obvious when he added, "Similarly, an employee may have a lower expectation of privacy in misconduct related to a duty of public trust, such as responsibility for spending public money or educating children."<sup>304</sup> In short, the expectation of privacy in misconduct would be whatever the Court decided. And, while the majority did not expressly conclude that no compelling interest exists in disclosing names of the administrative employees in question, the Court nevertheless ruled as much. The concluding paragraph of the majority opinion observes:

Montanans are provided a "heightened expectation of privacy" under the Montana Constitution in comparison to the U.S. Constitution, *State v. 1993 Chevrolet Pickup*, 2005 MT 180, ¶ 9, 328 Mont. 10, 116 P.3d 800, and Article II, Sections 9 and 10 of the Montana Constitution explicitly require that a balancing of the right to know and the right to privacy be conducted in this case. This Court's precedent provides the appropriate analysis of the particular state constitutional provisions that govern here, without regard to Fourth Amendment jurisprudence or federal approaches to the issue.<sup>305</sup>

The majority was likely influenced by Justice Morris's dissent in the 2011 *Gazette* case. Based on that dissent, the City argued that confidentiality was an important factor in the disciplinary process because it fostered honest communications between the employer and employee.<sup>306</sup> The majority embraced this notion by concluding "general assertions that public disclosure will foster public confidence in public institutions and maintain accountability for public officers are not sufficient to establish a strong public interest."<sup>307</sup> Here, the Court announces a principle that directly contravenes the stated purpose of Article II, Section 9, as articulated by the Convention Delegates and discussed, *supra*.

Justices Laurie McKinnon and Patricia Cotter dissented, but surprisingly, not based on Article II, Section 9, right-to-know jurisprudence. Rather, the dissenters focused on the right of privacy and how the state and federal courts dealt with that right under the Fourth Amendment. Following precedent in search and seizure cases, the dissenters believed that the offending employees' conduct deprived them of a reasonable expectation of

302. *Id.* at 134–38.

303. *Billings Gazette v. City of Billings*, 313 P.3d 129, 140 (Mont. 2013).

304. *Id.* at 140.

305. *Id.*

306. *Id.* at 140–41.

307. *Id.* at 141 (citing *Missoulain v. Board of Regents*, 675 P.2d 962, 972 (Mont. 1984)).

privacy in their actions, and they were not entitled to keep their names and conduct secret.<sup>308</sup> Justice McKinnon wrote:

I cannot accept that Montana citizens would recognize as reasonable, under *Katz*, *Mont. Human Rights Div.*, or any other precedent, this Court's willingness to shield the identities, positions, departments, and supervisors of public employees who access pornographic material on their work computers during work hours after having been warned that their computer usage would be monitored and that they cannot expect anonymity. I also am not willing to carve out an exception to the well-established test for determining a constitutionally protected expectation of privacy because we want to protect particular employees from embarrassment. The reasonableness of an expectation of privacy depends on what *society* deems is legitimate, and such a test cannot logically depend on whether a claim is asserted pursuant to search-and-seizure jurisprudence or precedent interpreting the right to know.<sup>309</sup>

In the summer of 2015, Adam Wade, a second-year University of Montana law student wrote a cogent critique of the 2013 *Billings Gazette* ruling.<sup>310</sup> He contended this decision marked a significant departure from the Court's well-settled right-to-know jurisprudence: "*Billings Gazette* eroded the public's right to know, created ambiguous precedent that will cause unpredictable results in future cases, and left many unresolved questions."<sup>311</sup> He prefaced his evaluation of the impact of the decision with a disciplined parsing of the Court's right-to-know precedent. He characterized the various holdings of the Court (also discussed herein) falling into one of two categories: cases in which the request for information relates to a public employee's official duties, and cases in which the public employee was given express assurances that their information would not be publicly released. In the former, the Court found the right of privacy to be clearly outweighed by the public's right of access. In the second category, the Court concluded the right of privacy prevailed over the right to know.<sup>312</sup>

What confounded Wade about the majority ruling in *Billings Gazette* was that the facts of the case fell squarely within the first category, but the Court declined to so rule.<sup>313</sup> Instead, the Court issued what Wade called a "public trust" exception to the open meeting doctrine, in which the Court recognized "a public employee's expectation of privacy in his or her identity with respect to internal disciplinary matters when that employee is not in a position of public trust, and the misconduct resulting in the discipline was not a violation of a duty requiring a high level of public trust."<sup>314</sup> Wade

308. *Id.* at 146–147 (McKinnon, J., dissenting).

309. *Id.* at 147–48.

310. Wade, *supra* note 16.

311. *Id.* at 203.

312. *Id.* at 188–92.

313. *Id.* at 198, 205.

314. *Id.* at 203–04.

observed that the Court's unwillingness to apply its traditional right-to-know analysis eroded well-settled law and created uncertainty about how the balancing test should be applied in the future.<sup>315</sup>

Although not mentioned by Wade, there is another, more troublesome aspect of the 2013 *Billings Gazette* case that could significantly tilt the balance away from disclosure. An implication may be drawn from the majority opinion that part of the rationale for refusing to disclose the names of the offending city employees was the embarrassment it could cause the employees if the public knew they were viewing pornography. Certainly, Justice McKinnon faulted the majority for its refusal to divulge names to shield the offending employees from public ridicule. The majority reasoned that causing this embarrassment was unnecessary because the underlying purpose of Article II, Section 9—to permit the public to observe the decision making process—would not be achieved by revealing the offenders' names.<sup>316</sup> Although the Court's reasoning here is dicta, it presents an additional factor the Court could use in the future to deny a requestor's relief. Under this new factor, a governmental agency could insist the requestor justify the reasons for obtaining the document before applying the balancing test to determine whether, on the public disclosure side of the equation, the requestor will learn anything about the decision-making process. If not, regardless of the demands of privacy, the agency could deny disclosure because the requestor would learn nothing about the decision-making process from the requested documents.

Nonetheless, in the next case to come before the Court, the Court returned to its traditional right-to-know analysis in affirming a district court ruling that disciplinary records of a school district employee could be disclosed.<sup>317</sup> At the time of the lawsuit, the employee had become a controversial figure as the Treasurer of Ravalli County.<sup>318</sup> The opinion does not reveal whether the employee's reduced expectation of privacy stemmed from her new position as an elected officer vested with public trust as district supervisor of school services who controlled spending.

A year later, the Court concluded that the details of an investigation into the former director of the Butte-Silver Bow Human Resources Department and her consequent firing were not subject to disclosure.<sup>319</sup> The issue arose when the Butte-Silver Bow Council closed a meeting to hear the reasons for the employee's termination.<sup>320</sup> Relying on its earlier *Billings Ga-*

315. *Id.*

316. *Billings Gazette v. City of Billings*, 313 P.3d 129, 141 (Mont. 2013).

317. *Missoula Cnty. Pub. Sch. v. Bitterroot Star*, 345 P.3d 1035, 1038–39 (Mont. 2015).

318. *Id.* at 1037.

319. *Moe v. Butte-Silver Bow Cnty.*, 371 P.3d 415, 423 (Mont. 2016).

320. *Id.* at 418–20.

*zette* ruling, the Court found that complaints and information from other employees spurred the firing, it was appropriate to close the meeting to protect these witnesses' privacy.<sup>321</sup> The Court buttressed its opinion by observing:

Public knowledge of the information gathered from other County employees during a personnel investigation would undermine the County's interest as an employer in encouraging candor and willingness of its employees to bring legitimate complaints to the County's Chief Executive. As we recognized in *Missoulain* and *Mont. Human Rights Div.*, the promotion of candid communication between an employer and its employees is good public policy. Protecting the confidentiality of such communications helps to encourage employees not to remain silent during internal investigations of workplace problems.<sup>322</sup>

The Court first announced this rationale in *Missoulain*, but had not applied it to resolve access issues since *Flesh* in 1990. Certainly, every one of the Court's decisions since *Flesh* involved disclosure of third party complaints and witnesses, but the Court resolved those issues by redacting the third parties' names. While *Moe* involved an open meetings issue, the matter could have gone forward in open session by not referring to the witnesses by name, so that the public interest in knowing the reasoning for firing a high-ranking department head could be realized. Moreover, the Court's observation (derived from Justice Morris's view in the 2011 and 2013 *Billings Gazette* cases) that "general assertions that public disclosure will foster public confidence in public institutions and maintain accountability for public officers are not sufficient to establish a strong public interest" could be applied in every access case to deny disclosure.<sup>323</sup>

The Court's back-pedaling on right-to-know canon continued in *Krakauer v. Commissioner of Higher Education ex rel. State*.<sup>324</sup> Jon Krakauer, a nationally-known author, sought records related to the reinstatement of the University of Montana's star quarterback as a student at the University, notwithstanding a rape allegation brought by another student. Krakauer asked for the records in connection with a book he was writing on sexual assault in American colleges and universities. The University president had accepted the university court's recommendation to dismiss the student for actions unbecoming of a University student. But the quarterback remained in school and continued to lead the Grizzly football team. The Commissioner of Higher Education, who had apparently reversed the decision of the president, refused to disclose the records of his actions based on FERPA, in spite of the fact that the Court in the *Pioneer Press* decision had

321. *Id.* at 421–22.

322. *Id.* at 422 (citing *Missoulain v. Board of Regents*, 675 P.2d 962, 973 (Mont. 1984); *Montana Human Rights Div. v. Billings*, 649 P.2d 1283, 1287–88 (Mont. 1982)).

323. *Id.* at 422.

324. *Krakauer v. Commissioner of Higher Educ. ex rel. State*, 381 P.3d 524 (Mont. 2016).

determined that the federal statute was inapplicable to record requests.<sup>325</sup> In Krakauer's right-to-know action, the district court applied the usual "three-step" analysis and concluded that the Commissioner had failed to establish that the student's right to privacy clearly outweighed the merits of public disclosure.<sup>326</sup>

Throughout the litigation, the Commissioner refused to acknowledge that he had the records, precluding an *in camera* review.<sup>327</sup> On appeal, the Court, ostensibly concerned that the district court had not reviewed the documents, remanded the matter back and ordered an *in camera* review.<sup>328</sup> However, the Court made it clear it did not agree with the district court's application of its prior access law:

Our concerns over the principles applied by the District Court in the constitutional balancing process, as well as the unique considerations under the federal and state law applicable to student records, compel us to reverse the District Court's order and to remand this matter with instructions to the District Court to conduct an *in camera* review of the requested records, and to re-apply the constitutional balancing test to those records in accordance with the following analysis of the interests here at issue.<sup>329</sup>

Instead of citing its own well-established rules, the Court elected to follow an obscure, unpublished, magistrate judge's ruling from the Middle District of Pennsylvania, *Moeck v. Pleasant Valley*,<sup>330</sup> creating an entirely new analysis where courts must balance "an enhanced privacy interest" for students when applying Article II, Section 9.<sup>331</sup>

The Court's ruling must have come as an unexpected surprise for the Commissioner, who had mentioned the case only in passing in his brief.<sup>332</sup> The magistrate judge in *Moeck* addressed whether plaintiffs pursuing a civil battery claim were entitled to discover unredacted versions of witness accounts in a school's investigation of events that gave rise to the civil claims.<sup>333</sup> The issue in the case was whether the plaintiffs had "demonstrate[ed] a genuine need for the information that outweighs the privacy interest of the students."<sup>334</sup> Since the plaintiffs "needed" the information in connection with their lawsuit, the magistrate judge had little trouble order-

325. *Id.* at 527, 529.

326. *Id.* at 532–33.

327. *Id.* at 527, 533.

328. *Id.* at 533.

329. *Id.*

330. No. 3:13-CV-1305, 2014 U.S. Dist. LEXIS 142431 (M.D. Pa. Oct. 7, 2014).

331. *Krakauer v. Commissioner of Higher Educ. ex rel. State*, 381 P.3d 524, 534 (Mont. 2016) (citing *Moeck*, 2014 U.S. Dist. LEXIS 142431 at \*6–7).

332. Appellee's Response Brief at \*25–26, *Krakauer v. Commissioner of Higher Educ. ex rel. State*, 2015 WL 7783285 (Mont. Nov. 23, 2015) (No. DA 15-0502).

333. *Moeck*, 2014 U.S. Dist. LEXIS at \*1–2.

334. *Id.* at \*8 (citing *Rios v. Read*, No. 75 C 296, 73 F.R.D. 589, 599, 1977 U.S. Dist. LEXIS 17900, 27 (E.D. N.Y. Jan. 14, 1977)).

ing production of unredacted versions of the witness statement.<sup>335</sup> Nothing in the magistrate's ruling reflects application of an enhanced privacy right.

As established in the foregoing discussion, the Court's traditional three-point analysis has always considered whether the person holding the potential privacy interest had an expectation of privacy in the documents. The basis for that expectation has varied from circumstance to circumstance. For example, in the *Great Falls Tribune/PSC* case, the privacy right arose from the then extant policy of the PSC to promise confidentiality for any filing the utility claimed was private.<sup>336</sup> Notwithstanding this determination, the Court did not conclude that the policy created an enhanced right of privacy.<sup>337</sup> If *Krakauer* can be read to require a reviewing district court to apply an enhanced privacy right whenever a policy, statute, or promise indicates that documents will not be made public, the three-step analysis will skew in favor of privacy. This will truly be the case if the Court also applies the doubling-up effect of the compelling interest standard under Section 10. Application of this new reasoning, of course, does significant harm to the public's right to know.

Two components of the Court's ruling in *Krakauer* are remarkable. First, the concept of an "enhanced right of privacy" in right-to-know cases was never urged by the Commissioner and was never briefed by *Krakauer*. The Court reached this conclusion without participation by either of the parties to the appeal. Second, the Court declined to answer all the issues related to the district court's efforts to balance privacy with the public's right to know. This, despite the fact that the "*in camera*" issue was not discussed in the appellate briefing of the parties. Instead, the Court noted:

Both parties argue at great length about various factors at issue here, such as the publicity that has followed this case, the source of the original request, the reasons behind the request, the named student's status as an athlete at a publicly-funded university, and the prior litigation, all of which may be considered and weighted by the District Court when conducting the balancing test. We decline to address these issues individually in favor of the District Court's application of the balancing test on remand.<sup>338</sup>

At the time of this writing, the district court conducted its *in camera* review of the documents reflecting the Commissioner's disciplinary process and the University's response and ordered their disclosure. The district court concluded that even under an "enhanced privacy right," the demands of individual privacy did not outweigh the merits of disclosure:

335. *Id.* at \*4–5, 6–7, 11 (citing *Blunt v. Lower Merion Sch. Dist.*, No. 07-3100, 2009 U.S. Dist. LEXIS 38925, at \*7 (E.D. Pa. May 7, 2009); *Zaal v. Maryland*, 602 A.2d 1247, 1256 (Md. 1992)).

336. *See Great Falls Tribune v. Montana Pub. Serv. Comm'n*, 82 P.3d 876, 879, 887 (Mont. 2003).

337. *Id.* at 878–79.

338. *Krakauer v. Commissioner of Higher Educ. ex rel. State*, 381 P.3d 524, 535 (Mont. 2016).

Here, weighing favorably in Doe's right to privacy is his enhanced privacy interest in his student records. On the other hand, a variety of factors weigh against Doe's right of privacy and in favor of the public's right to know. First, Doe's status as a high-profile student athlete weighs against his right of privacy. Prior to the commencement of disciplinary proceedings and criminal litigation against him, Doe was a well-known individual in Montana and enjoyed a position of prominence and popularity by virtue of his athletic position. Second, the University of Montana is a public institution and Doe, while not a paid athlete, receives valuable consideration for his skills in the form of an athletic scholarship. Although he is not a public official or university employee, Doe is a public representative of the University of Montana. Third, the details of Doe's alleged bad acts have been publicly aired through national and local media coverage, a publicly held criminal trial, and a nationally best-selling book. Fourth, the public has a compelling interest in understanding the disciplinary procedures employed by a state university, especially where the student in question is a prominent and popular campus figure whose education is paid for in part by public funds.<sup>339</sup>

## VII. CONCLUSION

As can be seen from this review of right-to-know cases since adoption of Article II, Section 9, the Court has granted significant life to the purposes of the provision as envisioned by the Convention delegates. This was particularly true during the time Justice Nelson occupied a position on the Court. However, the Court relied on Article II, Section 10 in decisions where the Court favored privacy over disclosure. In those cases, the Court insisted that the requestor establish a compelling need for the information—a difficult task at best, and a contradiction to the concept of open government, at worst. While the two- or three-step tests seem well-embedded in the Court's decisional law, despite its rejection of the compelling interest application in *T.L.S.*, the Court can be expected to tip the balance in favor of privacy in unpredictable ways. It will do so either by creating a new classification of privacy protections, as it did in the 2013 *Billings Gazette* and 2016 *Krakauer* cases, or by focusing on the “merits of public disclosure” and concluding that good government is served by confidentiality. Ultimately, these recent decisions create confusion in right-to-know jurisprudence and reflect a lack of institutional memory and a disturbing erosion of the 45-year development of case law enforcing open government in Montana.

339. Order on Motion for Release of Records, *Krakauer v. Commissioner of Higher Educ. ex rel State*, (Mont. 1st Dist. Ct. Oct. 19, 2017) (No. ADV-2014-117).